This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`

[redacted]

[redacted]

JS
JA
TB
v. 6

MODERN REPORTS;

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING'S BENCH,

CHANCERY, COMMON PLEAS,

AND

EXCHEQUER.

VOLUME THE SIXTH.

St. Brit. Comb. Holt Walker

MODERN REPORTS,

OR,

SELECT CASES

ADJUDGED IN

THE COURTS

OF

KING's BENCH,

CHANCERY, COMMON PLEAS,

AND

EXCHEQUER.

VOLUME THE SIXTH;

CONTAINING,

Cases argued and adjudged in the Court of Queen's Bench at Weſtminſter, in the Second and Third Years of Queen Anne, in the Time when Sir John Holt, Knt. ſat as Chief Juſtice in that Court: together with the Pleadings to ſeveral of the Caſes,

THE FIFTH EDITION,

CORRECTED:

WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES,

By THOMAS LEACH, Eſq.

OF THE MIDDLE TEMPLE, BARRISTER AT LAW.

LONDON:

PRINTED FOR G. G. AND J. ROBINSON; E. AND R. BROOKE; J. BUTTERWORTH; OGILVY AND SPEARE; AND L. WHITE, DUBLIN.

1794.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

a.56011

JUL 15 1901

THE PREFACE TO THE READERS.

IT is not to be doubted, but that, upon a ſerious peruſal, theſe Reports, now preſented to you, will appear to be taken with great care and ſolidity; ſeveral eminent perſons of diſtinguiſhing judgments in matters of this nature having recommended and encouraged this undertaking.

THE Author ſeems to be a ſtudious and obſerving GENTLEMAN, who was attendant at THE BAR many years, and had time and ability ſufficient for ſuch a performance.

I WILL only firſt obſerve, that theſe enſuing Caſes were lately argued and adjudged in THE QUEEN'S BENCH, and never printed before, ſo as there are no contemporary Reports yet extant.

And it is a good obſervation of my LORD COKE, "That latter reſolutions and judgments are the ſureſt, "and therefore the beſt to ſeaſon ſtudents in ſettling their

" judgment." And for that purpoſe, I obſerve here are ſome Reſolutions, which either explode or correct former Reſolutions, as being opinions wavering and not well digeſted, or not fully agreeable to the rule and reaſon of the Law.

In ſhort, theſe were taken when my Lord Chief Justice Holt, the great maſter of experience of the practice of that court, ſat there.

But becauſe it is known, that Prefacers' extravagant recommendations of books are very ſuſpicious, and that thereupon the readers not finding them anſwerable to the *præ-encomiums*, their over-raiſed expectations become palled, and they throw them aſide with ſlight and indignation, therefore theſe Caſes, as argued and reſolved, are wholly ſubmitted to your reſpective judgments.

Valete.

A TABLE

A

TABLE

OF THE

NAMES OF THE CASES.

A.

	Page
ADAMS *againſt* the Tertenants of Savage, 134, 199,	226
Adminiſtrator of Tyler (Langford *againſt* the), -	162
Aiery (Smith *againſt*), - - -	128
Aldred (Rich *againſt*), - - - -	216
Andrew's (Overſeers of the Poor of St.) - -	77
Andrew's (Pariſh of St. Clement's *againſt* that of St.)	287
Andrews (Berwick *againſt*), - - -	125
Anonymous (Principal and Intereſt), - -	11
Anonymous (Bail), - - - -	14
Anonymous (Attorney), - - - -	16
Anonymous (Previledge), - - -	16
Anonymous (Indictment), - - -	17
Anonymous (Practice), - - -	18
Anonymous (Practice), - - -	22
Anonymous (New Trial), - - -	22
Anonymous (Bond), - - - -	22
Anonymous (Bail), - - - -	24

Page

Anonymous (Deviſe), - - - 27
Anonymous (Execution), - - - 29
Anonymous (Coroner), - - - 37
Anonymous (Conviction), - - - 40
Anonymous (Pleading), - - - 40
Anonymous (Inquiry), - - - 40
Anonymous (Certiorari), - - - 40
Anonymous (Conſtable), - - - 42
Anonymous (Attorney), - - - 42
Anonymous (Certiorari), - - - - 43
Anonymous (Riot), - - - - 43
Anonymous (Inquiry), - - - - 43
Anonymous (Indictment), - - - 43
Anonymous (Biſhop's Leaſe), - - - 47
Anonymous (Apprentice), - - - - 70
Anonymous (Malicious Proſecution), - - 73
Anonymous (Bail), - - - - 77
Anonymous (Amendment), - - - 84
Anonymous (Scire Facias), - - - - 86
Anonymous (Practice), - - - - 86
Anonymous (Indictment), - - - 86
Anonymous (Feme Covert), - - - 88
Anonymous (Contempt), - - - - 88
Anonymous (Removal), - - - 88
Anonymous (Eſcape), - - - - 95
Anonymous (Arreſt), - - - - 96
Anonymous (Indictment), - - - 96
Anonymous (Feme Covert), - - - 105
Anonymous (Cheat), - - - 105
Anonymous (Treſpaſs), - - - - 105
Anonymous (Attorney), - - - 106
Anonymous (Attorney), - - - 114
Anonymous (Sale), - - - - 114
Anonymous (Pleading), - - - - 115
Anonymous (Execution), - - - - 115
Anonymous (Departure), - - - 115
Anonymous (Practice), - - - 122
Anonymous (Ejectment), - - - 130
Anonymous (Deviſe), - - - 133
Anonymous (Barriſter), - - - - - 137
Anonymous (Intereſt), - - - - 138

NAMES OF THE CASES.

	Page
Anonymous (Mandamus),	139
Anonymous (Overſeer),	140
Anonymous (Witneſs),	140
Anonymous (Attachment),	141
Anonymous (Gaol Delivery),	145
Anonymous (Taxes),	145
Anonymous (Adminiſtration),	145
Anonymous (Way),	149
Anonymous (Practice),	153
Anonymous (Pleading),	153
Anonymous (Abatement),	175
Anonymous (Sheriff),	179
Anonymous (Martial Law),	180
Anonymous (Habeas Corpus),	180
Anonymous (Excommunication),	180
Anonymous (Venue),	182
Anonymous (Fiſh Pond),	183
Anonymous (Corporation),	183
Anonymous (Fair),	184
Anonymous (Intereſt),	184
Anonymous (Attorney),	187
Anonymous (Abatement),	195
Anonymous (Quakers),	210
Anonymous (Arreſt),	210
Anonymous (View),	211
Anonymous (Warrant of Attorney),	212
Anonymous (Certiorari),	220
Anonymous (Indictment),	221
Anonymous (Execution),	221
Anonymous (Ejectment),	222
Anonymous (Venue),	222
Anonymous (New Trial),	222
Anonymous (Execution),	223
Anonymous (Tithe fiſh),	223
Anonymous (Pleading),	223
Anonymous (Special verdict),	225
Anonymous (Bail),	226
Anonymous (Bail bond),	229
Anonymous (Feme Covert),	230
Anonymous (Bail),	231
Anonymous (Principal),	238
Anonymous (Huſband and Wife),	239

Page

Anonymous (Deviſe), - - - - - 241
Anonymous (New Trial), - - - - 242
Anonymous (Action), - - - - 245
Anonymous (King), - - - - 248
Anonymous (Huſband and Wife), - - - 263
Anonymous (Prohibition), - - - - 308
Anonymous (Coſts), - - - - 309
Anonymous (Contempt), - - - - - 310
Anonymous *againſt* Cowper, - - - 90
Anonymous *againſt* Catchmade, - - - 90
Apprice (Ward *againſt*), - - - - 264
Arnote *againſt* Bream, - - - - 244
Aſhby *againſt* White, - - - - 44, 46
Aſhly and Others (Monkton *againſt*), - - - 38
Aſhly (Poply *againſt*), - - - - 147
Aſtry's (Sir Samuel) Caſe, - - - - 123
Ayland (Wiat *Qui Tam againſt*), - - - 33

B.

Baily and Shepherd *againſt* Orchard, - - 40
Baily (Boiſloe *againſt*), - - - - 221
Bains (The Queen *againſt*), - - - - 192
Baker *againſt* Pierce, - - - - 23
Baldoe (Fazakerly *againſt*), - - - 177
Baldwin *againſt* Cole, - - - - 212
Ball (Powel *againſt*), - - - - 210
Ball (The Queen *againſt*), - - - - 78
Banbury (Lord) *againſt* Wood, - - - 84
Bangley *againſt* Titcombe, - - - - 14
Banks, Sir Jacob (The Queen *againſt*), - - 245
Barber *againſt* Dennis, - - - - 69
Barnaby *againſt* Sanderſon, - - - 174
Bartlet (Smith *againſt*), - - - - 156
Baſty (Claxton *againſt*), - - - - 58
Bath, Mayor, &c. (The Queen *againſt*), - - 152
Batterſby *againſt* Marſh, - - - - 80
Bennoyer's Caſe, - - - - - 87

NAMES OF THE CASES.

	Page
Bernardiſton *againſt* The Sheriff of Middleſex,	309
Berwick *againſt* Andrews,	125
Beſt and Others (The Queen *againſt*),	137, 185
Bethell (The Queen *againſt*),	17, 34
Bignall *againſt* Devniſh,	242
Bilſon (Croſs *againſt*),	102
Biſhop of Durham *againſt* Ladler,	71
Blakamore *againſt* Tidderly,	240
Blanchett (Greaves *againſt*),	148
Bodiman (White *againſt*),	150
Boiſloe *againſt* Baily,	221
Bolton Duke of (Counteſs of Bridgwater *againſt*),	106
Bonner (Horner *againſt*),	86, 96
Booth *againſt* Booth,	288
Bothell (The Queen *againſt*),	34
Bovey *againſt* Wheeler,	267
Bourkamire *againſt* Darnell,	248
Bowman (Cragg *againſt*),	147
Bows (Hotherſhell *againſt*),	21
Brace, Redmond, and Others (Sir Harry Scott *againſt*),	38
Branworth (The Queen *againſt*),	240
Breame (Arnote *againſt*),	244
Brewſter *againſt* Weld,	229
Bridgwater (Counteſs of) *againſt* the Duke of Bolton,	106
Brigs *againſt* Collingſon,	70
Britton *againſt* Standiſh,	188
Broad (Harvey *againſt*),	148, 159, 196
Bromell (Oates *againſt*),	160, 176
Brough *againſt* Perkins,	80
Brown (Dillon *againſt*),	14
Browne (The Queen *againſt*),	87
Browne (Lepiot *againſt*),	198
Browning (Johnſon and Wife *againſt*),	216
Buck and Hale (The Queen *againſt*),	306
Buccleugh, Ducheſs and Others (The Queen *againſt*),	150
Buller *againſt* Crips,	30
Burkmire *againſt* Darnel,	249
Burridge *againſt* Forteſcue,	60
Burton (Knight *againſt*),	231
Buſhel *againſt* Paſmore,	217
Butler *againſt* Rolfe,	25
Buxom *againſt* Hoſkins,	263

C.

	Page
Cagnoni (Garibaldo *againſt*),	90, 266
Calwood (Robiſon *againſt*),	82
Caly *againſt* Hardy and Others,	164
Carleton *againſt* Mortagh,	113, 206
Carter (The Queen *againſt*),	168
Cary (Villars *againſt*),	303
Caſe of White,	18
Caſe of the Warden of the Fleet,	18
Caſe of Sutton, The Marſhal of the Court,	57, 91
Caſe of Lord Mohun,	59
Caſe of Elderton, Porter, and Others,	73
Caſe of Catchmade,	90
Caſe of Cowper,	90
Caſe of Ireland,	101
Caſe of the Overſeers of the Poor of the Pariſh of St. Andrew's,	77
Caſe of Sir Samuel Aſtry,	123
Caſe of Souther,	133
Caſe of Mr. Medlicot,	137
Caſe of Kent,	138
Caſe of Sexton,	165
Caſe of Crocket,	173
Caſe of Templer,	191
Caſe of Culliford,	219
Caſe of Peat,	228, 310
Caſe of French,	247
Catchmade's Caſe,	90
Cawſey (Michelſon *againſt*),	72
Chamberlain (Muriel *againſt*),	169
Chamberlain of London *againſt* Provoſt,	123
Chapman (The Queen *againſt*),	152
Chatherton (Parkins *againſt*),	159
Chetly *againſt* Wood,	42
Cholmley *againſt* Veale,	304
Clare (Hale *againſt*),	150
Claxton *againſt* Baſty,	58
Clement *againſt* Scudamore,	120
Clement's (Pariſh of St.) *againſt* that of St. Andrew's,	287
Clerk *againſt* Dealy,	151

	Page
Clerk *againſt* Withers,	290
Clerke (Parker *againſt*),	252
Clitheroe, Town (The King *againſt*),	133
Cluworth, Inhabitants of (The Queen *againſt*),	163
Cockroft *againſt* Smith,	230, 263
Cole *againſt* Turner,	149
Cole (Baldwin *againſt*),	212
College of Phyſicians *againſt* Roſe,	44
Collingſon (Brigs *againſt*),	70
Collingwood (The Queen *againſt*),	288
Collins *againſt* Jeſſot,	155
Combat (Rowſton *againſt*),	157
Company of Gunmakers in London (Vaughan *againſt*),	82
Company and Warden of Sadlers *againſt* Jones,	165
Cook (Lady) *againſt* Remington,	237
Corbett (The Queen *againſt*),	91
Corn (Ruſſell *againſt*),	127
Corniſh *againſt* Marks,	17
Cornwall (Muriel *againſt*),	169
Coſtham, Inhabitants of (The Inhabitants of the Pariſh of Weſtbury in the County of Wilts *againſt*),	213
Coteſworth (The Queen *againſt*),	172, 180
Cotton *againſt* Martin,	63
Counteſs of Bridgwater *againſt* the Duke of Bolton,	106
County of Wilts, Inhabitants of (The Queen *againſt*),	191, 307
Courtney (Strong *againſt*),	265
Cowper's Caſe,	90
Cragg *againſt* Bowman,	147
Cragger *againſt* Glover,	301
Crane (Dean *againſt*),	309
Crew (Inman *againſt*),	85
Crips (Buller *againſt*),	29
Criſp (The Queen *againſt*),	175
Crocket's Caſe,	175
Croker (Herring *againſt*),	184
Croſs *againſt* Bilſon,	102
Croſs (The Queen *againſt*),	43
Crowder *againſt* Oldfield,	19
Cuddon *againſt* Provoſt,	123

Page
Cudden *againſt* Eſtwick, - - - - 123
Culliford's Caſe, - - - - - 219
Cummer *againſt* Milton Pariſhes, - - 87

D.

Dallow (Jacob *againſt*), - - - - 230
Daniel (The Queen *againſt*), - - 99, 182, 289
Darnell (Burkmire *againſt*), - - - 249
Davenant *againſt* Rafter, - - - - 235
Davenant (Docmanny *againſt*), - - 198
Davis (Stanion *againſt*), - - - - 223
Davy *againſt* Salter, - - - - 250
Day *againſt* Muſket, - - - - 80
Dealy (Clark *againſt*), - - - 151
Dean *againſt* Crane, - - - - 309
Denham *againſt* Stephenſon, - - - 241
Dennington (Fitzhugh *againſt*), - - - 227, 259
Dennis (Barber *againſt*), - - - 69
Dennis *againſt* Doctor Lane, - - - 131
Devniſh (Bignal *againſt*), - - - - 242
Dillon *againſt* Brown, - - - - 14
Dixon (The Queen *againſt*), - - - 61
Dockmanny *againſt* Davenant, - - - - 198
Dod *againſt* Monger, - - - - 215
Dove *againſt* Smith, - - - - - 153
Dove (Gibbon *againſt*), - - - 230
Doughty (Rich *againſt*), - - - - 154
Denham (Ladler *againſt* the Biſhop of), - - - 71
Ducheſs of Buccleugh and Others (The Queen *againſt*), 150
Duke of Bolton (The Counteſs of Bridgwater *againſt*), 106
Dyer (The Queen *againſt*), - - - 41, 96
Dyer (Leſauld *againſt*), - - - - 57

NAMES OF THE CASES.

E.

	Page
Edwards (Treil *againſt*),	308
Elderton's Caſe, and Others,	73
Elizabeth Franklin (The Queen *againſt*),	220
Elmore *againſt* Tucker,	198
Elwis *againſt* Lombe,	117
Emerton *againſt* Selby,	114
Eſtwick (Cudden *againſt*),	123
Evans (Ward *againſt*),	36
Evans *againſt* Roberts,	61
Ewer *againſt* Jones,	25
Exon (Garden *againſt*),	88

F.

Fanſhaw *againſt* Morriſon,	157, 197
Farrow (William *againſt*),	82
Fazakerly *againſt* Baldoe,	177
Fitzhugh *againſt* Dennington,	227, 259
Fleet (The Queen *againſt* the Warden of),	18
Ford *againſt* Lord Grey,	44
Forteſcue (Burridge *againſt*),	60
Fox *againſt* Tilly,	225
Foxby (The Queen *againſt*),	11, 178, 213, 239
Foxon *againſt* Moſely,	154
Foy (Leiceſter *againſt*),	261
Franklin (The Queen *againſt*),	220
French's Caſe,	247
Fuz (Warren *againſt*),	22

G.

Garden *againſt* Exon,	88
Garibaldo *againſt* Cagnoni,	90, 266
Garlick (Winter *againſt*),	195
Gary (Wilſon *againſt*),	211
Gawdy *againſt* Pickerſale,	165

Genner

Page

Genner *againſt* Sparks, - - - - - 173
George (The Queen *againſt*), - - - 40, 57
Gibbon *againſt* Dove, - - - - 230
Gilbert *againſt* Parker and Others, - - 158
Glin and Another (The Queen *againſt*), - - 87
Glover (Cragger *againſt*), - - - - 301
Goddard *againſt* Smith, - - - - 261
Godolphin and his Wife *againſt* Tudor, - - 38, 234
Gold (The Queen *againſt*), - - - - 164
Goldwin (Tenant *againſt*), - - - 311
Goſnold (Robiſon *againſt*), - - - 171
Goulſton (Neal *againſt*), - - - - 167
Grant *againſt* Southers, - - - - 183
Gray (Noel *againſt*), - - - - - 22
Gree *againſt* Sharp, - - - - 265
Greaves *againſt* Blanchett, - - - - 148
Green (Selby *againſt*), - - - - 233
Grevell (Squire *againſt*), - - - 34
Grey, Lord (Ford *againſt*), - - - - 44
Grovenor *againſt* Soame, - - - - 122
Gunmakers in London, Company of (Vaughan *againſt*), 82
Guy (The Queen *againſt*), - - - 89

H.

Hale *againſt* Clare, - - - - 150
Hale and Buck (The Queen *againſt*), - - 306
Hall (Holmes *againſt*), - - - - 161
Hancock (Heins *againſt*), - - - - 140
Hannon (The Queen *againſt*), - - - - 311
Hardy and Others (Caly *againſt*), - - - 164
Harmon (Smith *againſt*), - - - - 142
Harnage (Robert *againſt*), - - - - 228
Harry Scott *againſt* Brace, Redmond, and Others, - 38
Harvey *againſt* Broad, - - - 148, 159, 196
Harwood *againſt* Turberville, - - - 200
Haw (Middleton *againſt*), - - - - 242
Heins *againſt* Hancock, - - - 140
Hereford, Mayor (The Queen *againſt*), - - 309
Herring *againſt* Croker, - - - - 184

	Page
Heydon (Staple *againſt*),	1
Hodges *againſt* Templer,	191
Holderſtaffe *againſt* Saunders,	16
Holman (Walden *againſt*),	115
Holmes *againſt* Hall,	161
Hooke (Lynch *againſt*),	225, 311
Horner *againſt* Bonnet,	86, 96
Hoſier (Oſbourne *againſt*),	167
Hoſkins (Buxom *againſt*),	263
Hoſkins (The Queen *againſt*),	58
Hoſkins (Williams *againſt*),	310
Hotherſhell *againſt* Bows,	21
Hundred of Thiſtleworth (Longueville *againſt*),	27
Hutton *againſt* Manſell,	172

I.

Inhabitants of Cluworth (The Queen *againſt*),	163
Inhabitants of Newnham Murry (The Queen *againſt*),	163
Inhabitants of the Pariſh of Weſtbury in the County of Wilts *againſt* The Inhabitants of Coſtham,	213
Inhabitants of the County of Wilts (The Queen *againſt*),	191, 307
Inman *againſt* Crew,	85
Ireland's Caſe,	101

J.

Jacob *againſt* Dallow,	230
Jackſon (Phips *againſt*),	305
Jackſon (Williams *againſt*),	146
Jenkins and his Wife *againſt* Plumbe,	91, 181
Jenkins (Muriel *againſt*),	169
Jeſſot (Collins *againſt*),	155
Jevon *againſt* Turner,	86
Johnſon *againſt* Shepney,	79
Johnſon and Wife *againſt* Browning,	216
Jones (Ewer *againſt*),	26
Jones (Sadlers' Company *againſt*),	78
Jones (Lewis *againſt*),	138
Jones (Warden and Company of Sadlers *againſt*),	165
Jordan *againſt* Thomkins,	77
Joſe *againſt* Mills,	14

K.

Page

Kent's Caſe, - - - - - - 138
Kingſdale *againſt* Mann, - - - - 27
Knight *againſt* Burton, - - - - 231

L.

Ladler (Biſhop of Durham *againſt*), - - 71
Lady Cook *againſt* Remington, - - - - 237
Lamb *againſt* William, - - - - 82
Lane (The Queen *againſt*), - - - 128
Lane, Doctor (Dennis *againſt*), - - - 131
Langford *againſt* the Adminiſtrator of Tyler, - - 162
Langley (The Queen *againſt*), - - - - 124
Lawrence and Others (Trevivan *againſt*), - - 256
Leiceſter *againſt* Foy, - - - - - - - 261
Leech (The Queen *againſt*), - - - - 145
Leonard *againſt* Stacy, - - - - 69, 139
Lepiot *againſt* Browne, - - - - - 198
Leſauld *againſt* Dyer, - - - - - - 57
Lett *againſt* Mills, - - - - 105
Lewis *againſt* Jones, - - - - 138
Lidford *againſt* Thomas, - - - - 96
Littleport, Pariſh of (The Queen *againſt*), - - 97
Lombe (Elwis *againſt*), - - - 117
London, The Mayor and Aldermen of (Smith *againſt*), 78
London, Company of Gunmakers in (Vaughan *againſt*), 82
London (The Queen *againſt*), - - - 204
Longville *againſt* the Hundred of Thiſtleworth, - 27
Lord Banbury *againſt* Wood, - - - 84
Lord Grey (Ford *againſt*), - - - 44
Lord Harry Scott *againſt* Brace, Redmond, and Others, - 38
Lord Mohun's Caſe, - - - - 59
Luttrel's Caſe, - - - - 77
Lynch *againſt* Hooke, - - - 225, 311

M.

Macarty (The Queen *againſt*), - - - - 391
Mandamus, White's Caſe, - - - 18

	Page
Mann (Kingſdale *againſt*),	27
Manſell (Hutton *againſt*),	172
Marks (Corniſh *againſt*),	17
Marſh (Batterſby *againſt*),	80
Marſhal of King's Bench (Grant *againſt*),	183
Martin (Cotton *againſt*),	63
Mathews (Warren *againſt*),	73
May (Slater *againſt*),	304
Mayor of Wincheſter *againſt* Wilks,	21
Mayor of Thetford (The Queen *againſt*),	25
Mayor and Aldermen of London (Smith *againſt*),	78
Mayor of Bath (The Queen *againſt*),	152
Mayor of Hereford (The Queen *againſt*),	309
Medlicot's Caſe,	137
Melhuiſh (Saunders *againſt*),	73
Memorandum (Biſhop's Leaſe),	57
Michell *againſt* Waldron,	306
Michelſon *againſt* Cawſey,	72
Middlemore (The Queen *againſt*),	212
Middleton *againſt* Haw,	242
Mills (Joſe *againſt*),	14
Mills *againſt* Wilkins,	62
Mills (Lett *againſt*),	105
Milton Pariſh (Cunmer *againſt*),	87
Mohun's (Lord) Caſe,	59
Monger (Doe *againſt*),	215
Monkton *againſt* Aſhly and Others,	38
More *againſt* Rowbothom,	162
More, Sir William (Parker *againſt*),	95
Morgan *againſt* Tomkins,	115
Morgan (Woodcock *againſt*),	306
Morley *againſt* Stacker,	83
Morriſon (Fanſhaw *againſt*),	157, 197
Mortagh (Carleton *againſt*),	113, 206
Moſely (Foxon *againſt*),	154
Mr. Medlicot's Caſe,	137
Muriel *againſt* Tracy, Jenkins, Chamberlain, and Cornwall,	169
Murry Newnham, Inhabitants of (The Queen *againſt*),	163
Muſket (Day *againſt*),	80

N.

Page
Nea *againſt* Goulſton, - - - - 167
Newnham Murry, Inhabitants of (The Queen *againſt*), 163
Noel *againſt* Gray, - - - - 22
Nurſe (Turner *againſt*), - - - - 149

O.

Oates *againſt* Bromell, - - - 160, 176
Ogden *againſt* Turner, - - - - - 104
Oldfield (Crowder *againſt*), - - - 19
Oliver *againſt* Vernon, - - - - 170
Orbell (The Queen *againſt*), - - - - 42
Orchard (Shepherd and Baily *againſt*), - - - 40
Oſbourne *againſt* Hoſier, - - - - - 167
Oſmond (Wells *againſt*), - - - - 238
Overſeers of the Poor of the Pariſh of St. Andrew, - 77

P.

Parſriman (Tilſden *againſt*), - - - - 253
Pariſh of Thurſley (The Queen *againſt*), - - 190
Pariſh of St. Andrew (The Caſe of Overſeers of the Poor of), - - - - - 77
Pariſh of Littleport (The Queen *againſt*), - - 97
Pariſh of Weſtbury in the County of Wilts (Inhabitants of) *againſt* the Inhabitants of Weſtham, - - 213
Pariſh of St. Clement's *againſt* that of St. Andrew, - 287
Pariſhes of Milton (Cunmer *againſt*), - - 87
Parker and Others (Gilbert *againſt*), - - 158
Parker, Sir Harry (Stillingfleet *againſt*), - - 248
Parker *againſt* Sir William More, - - - 95
Parker *againſt* Clerke, - - - - 252
Parkins *againſt* Woolaſton, - - 130, 139
Parkins *againſt* Chatherton, - - - 159

NAMES OF THE CASES.

	Page
Paſmore (Buſhel *againſt*),	217
Peat's Caſe,	228, 310
Penhallow (Smartle *againſt*),	63
Perkins (Brough *againſt*),	80
Phips *againſt* Jackſon,	305
Phyſicians (College of) *againſt* Roſe,	44
Pickerſale (Gawdy *againſt*),	165
Pierce (Baker *againſt*),	28
Plombe (Jenkins and his Wife *againſt*),	91, 181
Poply *againſt* Aſhly	147
Porter's Caſe,	74
Porter (The Queen *againſt*),	17
Powel *againſt* Ball,	210
Preſgrove *againſt* Saunders,	81
Provoſt (Cuddon *againſt*),	123
Pryor (Roſewell *againſt*),	116
Pugh and Others (The Queen *againſt*),	140

Q.

The Queen *againſt* Aſtry,	123
Bains,	192
Ball,	78
Banks (Sir Jacob,	245
Bath (Mayor, &c.),	152
Betmeyer,	87
Beſt and Others,	137, 185
Bethell,	17, 33
Branworth,	240
Browne,	87
Bucclough (Ducheſs) and Others,	150
Buck and Hale,	306
Carter,	168
Catchmade,	99
Chapman,	152
Clitheroe (Town),	133
Cluworth (Inhabitants),	163
Collingwood,	288
Corbett,	91

Coteſ-

	Page
THE QUEEN *againſt* Coteſworth, - - 172,	180
County of Wilts (Inhabitants of),	191, 307
Cowper, a Juſtice of the Peace, -	90
Criſp, - - -	175
Croſs, - - - -	43
Culliford, - - -	219
Daniel, - - 99,	182, 289
Dixon, - - -	61
Ducheſs of Buccleugh and Others,	150
Dyer, - - -	41, 96
Elderton, Porter, and Others, -	74
Elizabeth Franklin, - -	220
Foxby, - - 11,	178, 213, 239
Franklin, - - -	220
George, - - - -	40, 57
Glin and Another, - - -	87
Gold, - - -	164
Guy, - - - -	89
Hale and Buck, - -	306
Hannon, - - -	311
Hereford (Mayor), - -	309
Hoſkins, - - -	58
Inhabitants of Newnham Murry, -	163
Inhabitants of Cluworth, - -	163
Inhabitants of the County of Wilts,	191
Inhabitants of Wilts, - -	307
Ireland, - - -	102
Lane, - - - -	128
Langley, - - -	124
Leech, - - -	145
Littleport (Pariſh), - -	97
London, - - -	204
Lord Mohun, - - -	51
Lutterell, - - -	79
Macarty, - - - -	307
Mayor of Thetford, - -	25
Mayor of Bath, - -	152
Mayor of Hereford, - -	309
Middlemore, - - -	212

NAMES OF THE CASES.

		Page
THE QUEEN *againſt*	Mohun,	59
	Newnham Murry (Inhabitants)	163
	Orbell,	42
	Overſeers of the Poor of the Pariſh of St. Andrew,	77
	Pariſh of Littleport,	97
	Pariſh of Thurſley,	190
	Porter,	17
	Porter, Elderton, and Others,	74
	Peat,	228, 310
	Pugh and Others,	140
	Rawlins,	243
	Saintiff,	255
	Sir Jacob Banks,	245
	Sir Samuel Aſtry,	123
	Southers,	133
	St. Andrew,	77
	Steer and Others,	183
	Sutton,	90
	Thetford (Mayor),	25
	The Warden of the Fleet,	18
	Thurſley,	190
	Town of Clitheroe,	133
	Tracy,	30, 114, 178
	Tutchin,	164, 268
	Warden of the Fleet,	18
	Watton,	95
	Weekes,	220
	Weſt,	180
	Wheeler,	187
	White,	18
	Wilts (Inhabitants),	191, 307

R.

Page

Rafter (Davenant *againſt*), - - - - 235
Rawlins (The Queen *againſt*), - - - 243
Redmond and Others (Scott *againſt*), - - - 38
Reignots *againſt* Tipping, - - - 241
Remington (Lady Cook *againſt*), - - - - 237
Rich *againſt* Doughty, - - - - - 154
Rich *againſt* Aldred, - - - - 216
Ride *againſt* Ride, - - - - 239
Robert *againſt* Harnage, - - - - 228
Roberts (Evans *againſt*), - - - - 61
Robiſon *againſt* Calwood, - - - - 82
Robiſon *againſt* Goſnold, - - - - 171
Rolfe (Butler *againſt*), - - - - 25
Rook and his Wife (Wigg *againſt*), - - - 86
Roſe (College of Phyſicians *againſt*), - - - 44
Roſewell *againſt* Pryor, - - - - 116
Rowbothom (More *againſt*), - - - - 162
Rowſton *againſt* Combat, - - - - 157
Ruſſell *againſt* Corn, - - - - 127
Ruſſell (Walmſely *againſt*), - - - - 200

S.

Sadlers Company *againſt* Jones, - - - 166
Saintiff (The Queen *againſt*), - - - 255
Salter (Davy *againſt*), - - - - 251
Samuel Aſtry's Caſe, - - - - 123
Sanderſon (Barnaby *againſt*), - - - 174
Savage, Tertenants of (Adams *againſt*), - 134, 199, 226
Saunders *againſt* Melhuiſh, - - - - 73
Saunders (Preſgrove *againſt*), - - - - 81
Scrimſhaw *againſt* Weſtby, - - - - 302
Scott (Sir Harry) *againſt* Brace, Redmond, and Others, 38
Scudamore (Clement *againſt*), - - - 120
Selby *againſt* Green, - - - - - 233
Selby (Emmerton *againſt*), - - - - 114
Sexton's Caſe, - - - - - 163

	Page
Sharp (Gree *againſt*),	265
Shepherd (Wood *againſt*),	24
Shepherd and Baily *againſt* Orchard,	40
Shepney (Jonſon *againſt*),	79
Sheriff of Middleſex (Bernardiſton *againſt*),	309
Shuttle *againſt* Wood,	132
Sir Harry Parker (Stillingfleet *againſt*),	248
Sir Harry Scott *againſt* Brace, &c.	38
Sir William More (Parker *againſt*),	95
Sir Jacob Banks (The Queen *againſt*),	245
Sir Samuel Aſtry's Caſe,	123
Slater *againſt* May,	304
Smartle *againſt* Penhallow,	63
Smith (Cockroft *againſt*),	230, 263
Smith (Goddard *againſt*),	261
Smith *againſt* the Mayor and Aldermen of London,	78
Smith *againſt* Aiery,	128
Smith *againſt* Harmon,	142
Smith *againſt* Bartlet,	156
Smith (Dove *againſt*),	153
Soame (Groſvenor *againſt*),	122
Southers (Grant *againſt*),	183
Southers' Caſe,	133
Sparks (Genner *againſt*),	173
Sparks *againſt* Wood,	146
Squire *againſt* Grevell,	34
St. Andrew's (Overſeers of the Poor of),	77
Stacker (Morley *againſt*),	83
Stacy (Leonard *againſt*),	69, 140
Standiſh (Britton *againſt*),	188
St. Clement's *againſt* St. Andrew's,	287
Stanion *againſt* Davis,	223
Staple *againſt* Heydon,	1
Steer and Others (The Queen *againſt*),	183
Stevenſon (Denham *againſt*),	241
Stillingfleet *againſt* Sir Harry Parker,	248
Strong *againſt* Courtney,	265
Sutton's Caſe,	57, 91

T.

	Page
Talbot (Tracy *againſt*),	214
Templer (Hodges *againſt*),	191
Tenant *againſt* Goldwin,	311
Tertenants of Savage (Adams *againſt*),	134, 199, 226
The Biſhop of Durham *againſt* Ladler,	71
The College of Phyſicians *againſt* Roſe,	44
The Hundred of Thiſtleworth (Longville *againſt*),	28
The Mayor of Wincheſter *againſt* Wilks,	21
The Caſe of Sutton, the Marſhal of the Court,	57
The Company of Gunmakers (Vaughan *againſt*),	82
Thetford, Mayor (The Queen *againſt*),	25
Thiſtleworth, Hundred of (Longueville *againſt*),	27
Thomas (Lidford *againſt*),	96
Thomkins (Jordan *againſt*),	77
Thornborough *againſt* Whitacre,	305
Thurſley (The Queen *againſt*),	190
Tidderly (Blakamore *againſt*),	240
Tilly (Fox *againſt*),	225
Tilſden *againſt* Parfriman,	253
Tipping (Reignots *againſt*),	241
Titcombe (Bangley *againſt*),	14
Thiſtleworth (Longville *againſt* the Hundred of),	28
Tomkins (Morgan *againſt*),	215
Town of Chtheroe (The Queen *againſt*),	133
Tracy (The Queen *againſt*),	30, 114, 178
Tracy and Others (Muriel *againſt*),	169
Tracy *againſt* Talbot,	214
Trantor *againſt* Watſon,	11
Treil *againſt* Edwards,	308
Trevivan *againſt* Lawrence and Others,	256
Tucker (Elmore *a ainſt*),	198
Tudor (Godolphin and his Wife *againſt*),	38, 234
Turberville (Harwood *againſt*),	200
Turner (Jevon *againſt*),	86
Turner *againſt* Nurſe,	149
Turner (Cole *againſt*),	149
Turner (Ogden *againſt*),	104
Tutchin (The Queen *againſt*),	164, 268
Tyler, Adminiſtrator of (Langford *againſt*),	162

V.

	Page
Vaughan *againſt* the Company of Gunmakers in London,	82
Veale (Cholmley *againſt*),	304
Vernon (Oliver *againſt*),	170
Villars *againſt* Cary,	303

W.

	Page
Walden *againſt* Holman,	115
Waldron (Michell *againſt*),	396
Walmſely *againſt* Ruſſell,	209
Ward *againſt* Evans,	36
Ward *againſt* Apprice,	264
Warden of the Fleet (The Queen *againſt*),	18
Warden and Company of Sadlers *againſt* Jones,	165
Warren *againſt* Fuz,	22
Warren *againſt* Mathews,	73
Watſon (Trantor *againſt*),	11
Watton (The Queen *againſt*),	95
Weekes (The Queen *againſt*),	220
Weld (Brewſter *againſt*),	229
Wells *againſt* Oſmond,	238
Weſt (The Queen *againſt*),	180
Weſtbury (Inhabitants) *againſt* Coſtham,	213
Weſtby (Scrimſhaw *againſt*),	302
Wey *againſt* Yally,	194
Wheeler (The Queen *againſt*),	187
Wheeler (Bovey *againſt*),	267
Whitacre (Thornborough *againſt*),	305
White (Aſhby *againſt*),	44, 46
White *againſt* Bodiman,	150
White's Caſe,	18
Wiat *Qui Tam verſus* Ayland,	33
Wigg *againſt* Rook and his Wife,	86
Wilkins (Mills *againſt*),	62
Wilks (Mayor of Wincheſter *againſt*),	21
William (Lamb *againſt*),	82

Page

William *againſt* Farrow, - - - 82
Williams *againſt* Jackſon, - - - 146
Williams *againſt* Hoſkins, - - - 310
Wilſon *againſt* Gary, - - - 211
Wilts (The Queen *againſt* the Inhabitants of), - 191, 307
Wincheſter (Mayor of) *againſt* Wilks, - - 21
Winter *againſt* Garlick, - - - 195
Withers (Clerk *againſt*), - - - - 290
Wood *againſt* Shepherd, - - - 24
Wood (Chetly *againſt*), - - - 42
Wood (Lord Banbury *againſt*), - - - 84
Wood (Shuttle *againſt*), - - - 132
Wood (Sparks *againſt*), - - - 146
Woodcock *againſt* Morgan, - - - 306
Woolaſton (Parkins *againſt*), - - - 190, 139

Y.

Yally (Wey *againſt*), - - - 194

MICHAELMAS TERM,

The Second of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir Henry Gould, *Knt.*
Sir Lyttleton Powis, *Knt.*
Sir John Powell, *Knt.* } *Juſtices.*

Sir Edward Northey, *Knt. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

---

* Staple *againſt* Heydon. * [1]

Michaelmas Term, 13. *Will.* 3. *Roll* 370. Caſe 1.

THE PLAINTIFF *Staple* brings treſpaſs againſt *John Heydon* and *George Fowler*, for that they, on the thirty-firſt day of *May*, in the thirteenth year of the late *king William*, broke his cloſe, called THE WHARF, in *Stepney* in *Middleſex*, and threw down a perch of rails therein ſtanding: and alſo, for that, on the ſeventh day of *July* following, they entered into the ſame WHARF, and committed the like treſpaſs.

In treſpaſs for throwing down rails, and entering a wharf, if the defendant plead that *A.* was poſſeſſed of the wharf under a leaſe then unexpired, and had *a way* from thence over the *locus in quo*, and underlet the ſame to the defendant, with all *ways, &c.* neceſſary to the enjoying of the ſame, and that he the defendant had no other way to the *terminus ad quem*, the allegation that the defendant had "no other way" is ſurpluſage; and an iſſue taken thereon is an *immaterial iſſue*. S. C. 1. Salk. 173. 216. S. C. 2. Salk. 579. S. C. 3. Salk. 121. S. C. Holt, 217. S. C. 1. Ld. Ray. 707. S. C. 2. Ld. Ray. 922. Hob. 66. 2. Mod. 143. Carth. 75. 176. 281. Skin. 228. 664. Salk. 407. &c. 517. Sir M. Hale's notes on F. N. B. 86. K.

The defendant *George Fowler*, as to all, pleads *not guilty*.

But *John Heydon*, as to the treſpaſs laid on the thirty-firſt of *May*, pleads *not guilty* as to the force, and *juſtifies* the entry, and throwing down the rails, for that long before one *Edward Gray* was poſſeſſed by virtue of a certain leaſe for eighty years, then to

STAPLE *againſt* HEYDON.

come, and yet unexpired, of the ſaid WHARF, and alſo of a yard next adjoining thereunto; and that, for the neceſſary uſe of the ſaid yard, he had and uſed *a way* over the ſaid WHARF to certain ſtairs on the *river Thames*, which was thereunto contiguous, there to take water, &c.; and that being ſo poſſeſſed, he, on ſuch a day and year, which was prior to the time laid in the treſpaſs, demiſed the ſaid yard, *inter alia*, to the defendant *John Heydon* for a term of years yet unexpired, with all lawful ways, &c. thereunto belonging; by virtue whereof he entered, and was poſſeſſed, &c. whereby he was intitled to the ſaid *way*: that the plaintiff obſtructed it with rails; ſo that he, coming to uſe it, could not paſs; and that he requeſted the plaintiff to open the rails, which he refuſed; ſo he juſtified the throwing them down. He pleaded directly in the ſame manner to the other treſpaſs laid on the ſeventh of *July*; and avers, that, at the ſeveral times, he had no other *way* to the ſaid ſtairs and *river Thames* than by and through the ſaid WHARF.

* [2]

Hob. 66.

* The plaintiff, as to the plea to the firſt treſpaſs, replies, that the defendant *John Heydon* had another convenienter way to the *river Thames* than through the ſaid WHARF, and thereupon they were at iſſue: and upon the plea to the treſpaſs on the ſeventh of *July* he demurs; "therefore let a jury come to try the iſſues, and aſſeſs "contingent damages upon the demurrer."

Both defendants made default at *niſi prius*; which being recorded, the inqueſt is awarded by default, and *G. Fowler* is found guilty of the treſpaſs on the thirty-firſt of *May*, but acquitted of that on the ſeventh of *July*; and *John Heydon* is acquitted of the treſpaſs on the thirty-firſt of *May*, as to the force, but the jury found, as to the reſt, that he had no other way to the ſaid ſtairs and *river Thames* than through the ſaid WHARF; and aſſeſs damages upon the demurrer, and acquit him of the treſpaſs on the ſeventh of *July*.

In this caſe ſeveral points were moved, and reſolved by the Court.

THE FIRST QUESTION was, Whether *a repleader* ſhould be in this caſe, there being, as was ſaid, an *immaterial iſſue* joined? And THE COURT held clearly the iſſue was impertinent.

But as to repleaders in general, THE COURT held,

When a repleader ſhall be upon an immaterial iſſue.

FIRST, That *a repleader* is to be awarded when ſuch an iſſue is joined, as the Court after trial thereof cannot give a judgment, as being impertinent or uncertain, and not determining the right (*a*).

Poſt. 102. Carth. 371. Vide Doctrina Pl. 311.

Before the ſtatutes of jeofails the Court might award *a repleader* on an immaterial iſſue.

SECONDLY, That before the *ſtatute of jeofails* (*b*), if ſuch an iſſue were joined, the Court before trial might award a repleader (*c*).

(*a*) See the Year-Book 22. *Hen.* 6. pl. 16. 1. Keb. 23. 39. 89. 1. Lev. 32. And ſee the caſe of Rex *v.* Philips, 1. Salk. 579. Burn, 295.

(*b*) 16. & 17. *Car.* 2. c. 8.

(*c*) 3. Keb. 664. 1. Salk. 216. 2.

THIRDLY,

THIRDLY, When *a repleader* is awarded, the amendment muſt begin where the plea, which makes the iſſue bad, begins to be faulty (*a*); and therefore if one make himſelf a bad title to his declaration, to which there is a bad bar, and thereupon a bad replication, on which there is iſſue, there the repleader muſt be awarded and entered on record; and the plaintiff ſhall declare *de novo*, &c. But if the bar be good, or the plea be good, and the replication bad, and iſſue thereupon, there a repleader will be only as to replication; but if bar and replication be both bad, and a repleader is awarded, it muſt be as to both (*b*).

On a *repleader* awarded, the *amendment* begins where the proceedings were firſt faulty. Raym. 458. Cowp. 510. 5. Com. Dig. "Pleader" (R. 18.).

FOURTHLY, If the Court award *a repleader* where it ought not to have been, or deny it when it ought to be, it is error (*c*).

It is error to award a *repleader* improperly.

FIFTHLY, That upon the award of *a repleader*, there muſt be no coſts (*d*), becauſe it is a judgment of the Court upon the pleading; but upon *amendment* of a plea in paper, there muſt be coſts (*e*).

No coſts on award of repleader. Hard. 331. 1. Lev. 32. 2. Vent. 196. Barnes, 125. Salk. 579. 1. Burr. 301. 3. Burr. 304. Hullock on Coſts, 353.

SIXTHLY, That upon a general rule for *repleader*, without any direction from the Court from what they ſhould begin the *repleader*, it muſt begin from the firſt fault which occaſioned the bad pleading commenced; for the judgment is, *quod partes replacitent* (*f*).

General rule of repleader.

* [3]

* SEVENTHLY, That the pleadings in this caſe were ſuch as *a repleader* would be awarded upon at the common law; for the defendant having inſiſted upon a title to *a way* by grant, his averment, that he had no other way, was immaterial, and by conſequence the iſſue thereupon impertinent; beſides, there was no iſſue at all joined, for the plaintiff's affirmative does not meet with the defendant's negative.

Averment immaterial, and the iſſue impertinent. Carth. 371.

EIGHTHLY, That though *a repleader* ſhould have been at common law in this caſe, this motion having been made before trial, and it being doubtful whether a verdict would not help it by the *ſtatute of jeofails*, THE COURT ſaid it would be juſt in them not to grant *a repleader* till after verdict; for they ſaid, they might indeed grant *a repleader* before verdict at common law, but they were not bound to do it.

Repleader by common law, and when grantable.

So NOTE the diverſity ſince the ſtatute; for though it were reaſonable to award *a repleader* before verdict at common law, where the pleading appeared ſuch on which no judgment could be after verdict; yet ſince the ſtatute, when a verdict may cure immaterial or informal iſſues, it may not be proper to do it.

Aid by ſtatute law.

(*a*) Year-Books 5. *Edw.* 4. pl. 8. 19. *Edw.* 4. pl. 1. And ſee Dyer, 117, 118.
(*b*) 3. Keb. 664.
(*c*) Poſt. 102.
(*d*) Hardres, 331. 1. Lev. 32. 1. Burr. 301. 304.
(*e*) 2. Vent. 196. Loft's Rep. 155. Hullock on Coſts. 347.
(*f*) 2. Salk. 579. 4. Bac. Ab. 126.

No iſſue joined. 2. Lev. 135. Acc. 12. 2. Saund. 318, 319. 3. Com. Dig. "Chemin" (D. 2.)

NINTHLY, After the trial THE COURT held, that this iſſue was ſuch on which no judgment could be; for the defendant pleaded, that he had no other way to *the ſtairs* and *river Thames*; the plaintiff replies, that he had another way to *the Thames*; and the jury found no other way to the ſaid *ſtairs* and *river Thames*; ſo in truth there was no iſſue joined.

No repleader when parties are out of court.

TENTHLY, that in this caſe there could be no *repleader*, for the parties were quite out of court by the default.

Repleader after verdict. Cro. Eliz. 318. 883.

NOTE, By the Year-Book 40. *Ed.* 3. 15. if a jury do not find *aſſets* to a certain value, the verdict is inſufficient, and *a repleader* ſhall be granted, and the iſſue tried by another inqueſt.

THE SECOND QUESTION was in reference to *the way* claimed; and theſe points were agreed on by all, *viz.*

A way cannot be claimed from one part of a man's ground to another. Poſt. 149. 163. Carth. 451. 3. Com. Dig. "Chemin" (D. 1.).

FIRST, that a man cannot claim *a way* over my ground from one part thereof to another; but from one part of his own ground to another, he may claim a way over my ground.

A ſtranger may have a way over another's ſoil. Poſt. 149. 2. Roll. Abr. 60. 1. Cro. Jac. 170. Yelv. 164. 1. Brownl. 6. 126. 3. Com. Dig. "Chemin" (D. 2.) (D. 4.).

SECONDLY, A ſtranger may have *a way* over another's ſoil three manner of ways, *viz.* for neceſſity, by grant, and by preſcription. For neceſſity; as if *A.* has an acre of ground ſurrounded by ground of *B.* *A.* for neceſſity has a way over a convenient part of *B.'s* ground to his own ſoil, as a neceſſary incident to his ground: So if *A.* grant a piece of land which is ſurrounded by land of the vendor, he grants a way as a neceſſary incident therewith.

The grantee of land ſhall have all the ways, eaſements, &c. which the grantor had. Cro. Jac. 121, 122. 170. 3. Lev. 305. * [4] 3. Com. Dig. "Chemin" (D. 3.) (D. 4).

THIRDLY, If one be ſeiſed of *Black-acre* and *White-acre*, and uſe a way over *White-acre* from *Black-acre* to a mill, river, &c. and he grant *Black-acre* to *B.* with all ways, eaſements, &c. the grantee ſhall have the ſame conveniency that the grantor had when he had *Black-acre*. So if *A.* has two acres of land, and has a way from them over another's ſoil, and grant one of them with all ways, the grantee ſhall have the ſame way that the grantor had: but there the * grantee, in making title, muſt alledge ſuch an eſtate in the grantor as is traverſable, and not only ſay, that the grantor was *poſſeſſed* of the place to which, &c. for a term of years; for there the poſſeſſion would be traverſable materially.

Plea in a way by neceſſity. Noy. 9. Fareſt. 55.

If a way of neceſſity be claimed, it is a good plea to ſay, the party has another way; but otherwiſe where a way is claimed by grant or preſcription.

The way of pleading a particular eſtate.

FOURTHLY, The way of pleading in this caſe had been to ſhew, that ſuch a one was ſeiſed in fee of the place to which, &c. and being ſo ſeiſed was intitled to a way, and ſhew how, and that he granted to the leſſor, &c. who alſo granted it to him, &c. for when one ſhews a *particular eſtate*, he muſt ſettle *the fee* in ſomebody.

FIFTHLY,

FIFTHLY, It was agreed, that by the grant of a houſe to which there is a way of neceſſity, without more, the grantee ſhall have the way as well as if it were ſpecially mentioned in the grant. The grant of a *houſe* is alſo a grant of *a way* to it.

Hob. 254. 295. Cro. Jac. 170. 190. 3. Com. Dig. "Chemin (D. 3.).

On THE THIRD QUESTION it was reſolved, that if the plaintiff had demurred to the defendant's plea, without doubt he ſhould have had judgment (*a*); for that after a demurrer *a repleader* ſhall not be, becauſe the parties by mutual aſſent have put themſelves on the judgment of the Court (*b*). A *repleader* is not grantable after demurrer.

Upon THE FOURTH QUESTION, Whether the matter were now cured after verdict by the *ſtatute of jeofails*? theſe points were agreed: In what caſe the verdict ſhall cure an immaterial iſſue.

FIRST, If a jury find a point in iſſue, and a ſuperfluous matter over and above, that ſhall not vitiate the verdict.

SECONDLY, That in this caſe the jury found nothing that was put in iſſue; for they do not find that either he had no other way, or had another way to *the Thames*; but that he had no other way to the ſtairs and *Thames*, which might well be, and yet he might have another way to *the Thames*.

On THE FIFTH QUESTION, as to defaults after iſſue, THE COURT took a diverſity between a real and a perſonal action; for in a real action, if a tenant make default, the demandant may, if he pleaſe, waive the benefit of it, and proceed by further proceſs againſt him; as if the tenant make default on the original, the demandant ſhall have *a grand cape* (*c*); and if the tenant do not ſave his default, the demandant, if he inſiſts upon it, ſhall have judgment final upon the firſt default (*i. e.* at the return of *the grand cape*), but he may, if he pleaſe, releaſe the default, and continue further proceſs againſt him: in like manner of a default after appearance, the demandant ſhall have *a petit cape*, &c. and if the tenant do not ſave his default, he may have judgment upon the default; or if he will waive that advantage, he may, and proceed by further proceſs. If, in a real action, the tenant make default at *niſi prius*, the default is never recorded, but only *the poſtea* marked; and the demandant, if he will, ſhall have *a petit cape*, and judgment thereupon, if the default * be not ſaved; or elſe he may waive the *default*, and continue with further proceſs. But in caſe of a perſonal action, a default at the trial is always recorded, and there is no further proceſs in law to bring the defendant into court upon releaſe of the default. And anciently, at every *continuance-day*, the parties were demandable; and if the defendant did not appear, or were not *eſſoined*, his default was On a default at *niſi prius* after iſſue, in a real action, *final judgment* ſhall be given, except the default be ſaved by the tenant or waived by the demandant.

1. Roll. Abr. 585.
1. Lev. 105.
1. Mod. 248.
2. Show. 424.
1. Salk. 216, 217.
1. Bulſt. 160.
2. Cro. 36.
1. Vent. 60.
2. Saund. 45.
1. Jo. 412, 413.
1. Cro. 517.
Stra. 46. 612.
3. Com. Dig. "Enqueſt" (L.).
5. Com. Dig. "Pleader" (B. 11.).

(*a*) See Ridgeway's caſe.

(*b*) Li. 3. 52. Doctr. Plac. 311. Sed vide poſt. 102. and 3. Lev. 440. contra.

(*c*) See 1. Lev. 105. that judgment ought not to be given on a default in real actions, but that *a grand cape* ought to iſſue on a default before appearance, and *a petit cape*, if the default be after appearance. See 2. Inſt. 80.

STAPLE *againſt* HEYDON.

recorded, and judgment given againſt him thereupon: But by the *ſtatute of Marlbridge* (*a*), and the ſtatute of *Weſtminſter the Second* (*b*), after iſſue joined in a perſonal action, the defendant ſhall have but one *eſſoin* and one *default*; and if the *default* be upon the *venire facias*, then it is recorded, and *a diſtringas* ſhall go againſt the jurors *ad triana*", and againſt the defendant, to receive his judgment; but if he come in at the day of *niſi prius*, he ſaves his default; but if he does not, the default is peremptory, and *final judgment* ſhall be given thereupon. And it is to be obſerved, that this one *eſſoin* and one *default* that the ſtatutes give, muſt be at the firſt *continuance* after the iſſue; for if the defendant ſhould appear at the firſt continuance, VIZ. at the *venire facias*, he ſhall neither be *eſſoined*, or have *a default* ſaved at the return of the *diſtringas*; but judgment peremptory ſhall be given on ſuch default (*c*). But if the defendant *imparl* to a day in a perſonal action, and do not appear at the day, *judgment final* ſhall be given againſt him; for the *default* is *peremptory* to him, and there is no proceſs to bring him into court again. In debt, the defendant pleads in abatement to the writ (*d*), to which the plaintiff *imparls*, and, at the day given, the defendant makes default; *judgment final* is upon the default, though the plea was only in abatement. In treſpaſs, the defendant demurred (*e*), and made default at the day given, and *judgment final*. In debt upon an obligation (*f*), the defendant pleads a releaſe, and, after demurrer, day is given, and default is made by the defendant at the day; *judgment final* ſhall be given. In treſpaſs, if the defendant imparls (*g*), and makes default at the day, judgment final ſhall be given. So in debt (*h*). And the caſe of *Peplow v. Rowley* (*i*) was remembered, where a judgment in an inferior court was reverſed for this error, That the defendant being *eſſoined*, and making default at the day given by *eſſoin*, they gave a further day when it ſhould be a judgment by default.

1. Cro. 511. But ſee 2. Term Rep. 16. that an *eſſoin* does not lie in a perſonal action.

Whether here judgment ſhould be upon the demurrer, or upon the default.

So now, what ſtuck with THE COURT was, Whether judgment ſhould be given upon *the demurrer* againſt the defendant, or upon *the default*? That is, Whether, he being out of court as to one iſſue by the default, he could be preſent in court as to the iſſue in law upon *the demurrer*, ſo that the Court might give judgment thereupon?

And as TO THIS POINT, the caſe was, A defendant in two ſeveral treſpaſſes pleads an ill plea to one; on which the plaintiff demurs, and joins iſſue upon the other, and makes default at the day of *niſi prius*; whereupon the inqueſt is taken by default as to the iſſue, and contingent damages upon the demurrer.

(*a*) C. 13.
(*b*) C. 27.
(*c*) 2. Inſt. 217.
(*d*) Year-Book 38. *Hen.* 6. pl. 33.
(*e*) Year-Book 18. *Edw.* 4. pl. 7.
(*f*) Year-Book 1. *Hen.* 7. pl 21.
(*g*)
(*h*) Year-Book 11. *Hen.* 7. pl. 5.
(*i*) Cro. Jac. 358.

WARD,

WARD, *for the plaintiff*, argued, that judgment ought to be upon the demurrer.

* FIRST, This is not ſuch *a default* on which judgment can be given; and he took this diverſity, That wherever, in a real action, the default is ſaveable, ſo that *grand* or *petit cape* ſhall go, there, in a perſonal action, *a default* is not peremptory; but there is, indeed, a proper proceſs to iſſue, and bring the party into court. As for the purpoſe, in a real action after imparlance *prece partium*, or upon *eſſoin*, if the party having choſe his day fail thereupon, *peremptory judgment* ſhall be thereupon, and the lands ſeized; and in that caſe, judgment would be likewiſe peremptory in a perſonal action; but if *the default* were upon the return of a proceſs, which is ſaveable in a real action, there judgment peremptory ought not to be in a perſonal action, becauſe there the day is not taken or choſen by the party, but given to him by the Court; and it ſeems but reaſonable that he ſhould be more ſeverely uſed upon his default at his own day, than at a *dies datus* by the Court. But this is only in reference to defendants; but in caſe of plaintiffs, they are in many caſes demandable at the day given to purſue their writ; but in caſe of defendants, upon default at a day given before plea pleaded, there ſhall be no *judgment peremptory (a)*. In treſpaſs, the defendant appeared upon *the exigent*, and day is given over to another Term, at which the defendant makes *default*; and *per Curiam*, the plaintiff can only have proceſs *ad reſpondendum*, and if he fail thereat, then three *capias's* and *exigent* as before; and he quoted the caſes in the margin (*b*). The writ of *ad audiendum judicium* was of great uſe then, though now altogether diſuſed. The Year-Book of *Henry the Sixth* (*c*) gives an account of it, that formerly, when a demurrer was joined in a real or perſonal action, this writ uſed to go to bring the parties in to hear judgment; but now the courſe is, that he attend at his peril. By the Year-Book of *Henry the Sixth (d)* it appears, that the defendant is not demandable on demurrer, but the plaintiff is only to appear and pray his judgment: Juſt as upon a *writ of enquiry* of damages, the defendant has no *day in bank*; and in THE COMMON PLEAS, neither plaintiff nor defendant have a day given them, but the plaintiff is to attend for his judgment (*e*): but the plaintiff has a day by courſe of the king's bench *(f)*. Now here, though there be but one *venire facias* to try the iſſue, and inquire of the contingent damages, yet theſe are as two diſtinct matters; for anciently the courſe was not to put both together; but that is new, and for eaſe and diſpatch; and here the

* [6]

(*a*) Year-Book 7. *Hen.* 6. 19. 41. 19. *Hen.* 8. pl. 6.

(*b*) Year-Book 20. *Edw.* 3. pl. 12. the 2. *Hen.* 4. pl. 3. the 2. *Hen.* 4. pl. 4. the 11. *Hen* 4. pl. 31, 32. the 20. *Hen.* 6. pl. 44. and Jud. Reg. 1. a. and b.

(*c*) 37. *Hen.* 6. pl. 29.

(*d*) 4. *Hen* 6. pl. 29.

(*e*) See Preſton *v.* Tooley, Cro. Eliz. 75. S. C. Yelv 97. S. C. 11. Co. 6. and Mathew *v.* Haſſell, Cro. Eliz. 144.

(*f*) Yelv. 97. 1. Roll. Abr. 486.

STAPLE *againſt* HEYDON.

jury might have been diſcharged of the iſſue, and yet inquire of the damages as an inqueſt of office (*a*).

How if judgment were to be upon the default.

SECONDLY, He inſiſted on it, that if judgment were to be upon *the default*, it muſt have been given at the *niſi prius*, and that being not done, and *the default* being for the plaintiff's advantage, he might waive * or releaſe it, and quoted the Year-Book of *Edward the Third* (*b*). And the defendant upon a writ of error can never take advantage of the matter (*c*).

*[7]

DARNELL, *contra*. Wherever there is a demurrer in any perſonal action, and the defendant makes *default* at the day, the demurrer is waived (*d*). In perſonal actions, if the parties are at iſſue or demurrer, and after the defendant makes default, judgment ſhall be upon the *default*, and *the demurrer* is waived (*e*). And as to the objection, that if judgment were to be given on *the default* it ſhould have been immediately, I anſwer, that all that the Judges of *niſi prius* could do was to record the default.

POWELL, *Juſtice*. I do not find but that the parties are demandable both in caſe of a day given upon demurrer and upon iſſue joined; but after iſſue inqueſt may be taken by default. But in debt, ſuppoſe the defendant come in upon *the exigent*, and the plaintiff, as he may, prays a day, there, it being a day had on prayer of the plaintiff before count, if the defendant make default, proceſs ſhall go to bring him in; but if the plaintiff had counted, and, before iſſue, the defendant had made default, if the plaintiff will demand him, he may have judgment upon *the default*. And I take it to be the ſame upon demurrer where day is given at which the defendant makes default, for there *judgment final* ſhall be, and no proceſs *ad audiendum judicium* (*f*). And the Year-Book of 20. *Hen.* 6. *pl.* 44. is miſtaken by *Fitzherbert*, for the Book is full that judgment muſt be upon the default. After demurrer in a perſonal action, proceſs ſhould go *ad audiendum judicium* (*g*); but before demurrer or iſſue joined, if day be given after pleading, a default will be peremptory, and judgment final upon *default*: but the uſage now is not to demand them. It is very hard to make a default at a day given by the Court on demurrer peremptory; but here is an iſſue as to part, and a demurrer as to the other part, and a *venire facias* to try the iſſue and inquire of damages; and day is given with a *niſi prius*, which day of *niſi prius* is in truth but to try the iſſue and inquire of damages, but the day on the demurrer is *ad audiendum judicium*. So that in truth the day given

Iſſue to part, and demurrer to part. Co. Lit. 71, 72. Inſt. Leg. 567. &c.

2. Saund. 13.

(*a*) Year-Book 16. *Edw.* 4. pl. 1. 2. Inſt. 440.

(*b*) 42. *Edw.* 3. pl. 1.

(*c*) *Vide* 2. Saund. 46.

(*d*) Year-Book 38. *Hen.* 6 pl. 33. abridged by Fitz. "Default," 59.

(*e*) Year-Book 39. *Hen.* 6. pl. 16. to 18. abridged by Brooke, "Default," 58. Bro. "Default," 73. Fitz, "Jour," 33. Fitz. "Proceſs," 147. and the Year-Book 45. *Edw.* 3. pl. 3.

(*f*) See the Year-Book 18. *Edw.* 4. pl. 7.

(*g*) Year-Book 44. *Edw.* 3. pl. 1.

STAPLE *againſt* HEYDON.

ad triandum exitum, &c. has nothing to do with the day of demurrer, and it is not neceſſary that the defendant ſhould have a day on the writ of inquiry; ſo that the day *ad audiendum judicium* in this caſe is the *day of bank*, and the default at *niſi prius* is only to that to which the defendant had a day there, that is, to try the iſſue, and the taking the inqueſt by default is a waiver of taking advantage of judgment by default. Nor do I know where the plaintiff may in a perſonal action take advantage of a default upon the inqueſt; but where the defendant pleads a releaſe or acquittance, and at iſſue makes default, there indeed he may pray judgment upon the default, or that inqueſt be taken by default; but after he takes inqueſt by default, he is too * late to pray judgment by default, for his taking the inqueſt is a waiver of the judgment by default; and judgment muſt be upon *the verdict*, and not upon *the default*, that being waived by prayer of inqueſt. Upon an iſſue of *non eſt factum*, you cannot take a judgment by default.

* [8]

Vide ſtat. 8. and 9. *W.* 3. c. 10. 2. Lilly, 43. 38.

HOLT, *Chief Juſtice.* The queſtion firſt is, Whether if default be in a perſonal action after declaration, and day given over, either by imparlance or any other day,—Whether, I ſay, this be ſo peremptory that judgment final ought to be upon that default? And I think, in caſe of imparlance, whether to a day in the ſame Term, or another, judgment final ought to be. The Year-Books *Edward the Fourth* (*a*) and *Henry the Sixth* (*b*) are full in the point, without taking any difference. Now then, upon demurrer, becauſe parties are at iſſue in judgment of Court, ſuppoſe it had been in real action, and a *Curia adviſare vult*, and the defendant makes default, the *petit cape* muſt go, and he does not ſave his default; Shall not judgment final be given upon the default? If it be ſo when there is a demurrer in a real action, Is it not much ſtronger in a demurrer in a perſonal action? And it is not leſs peremptory upon demurrer than imparlance: for if default be after demurrer on day given in the ſame Term, it is peremptory; that is, if the party do not come at ſuch a day in the ſame Term, it is a departure in deſpite of the Court; and there in a real action no *petit cape* ſhall go, but judgment final ſhall be on the demurrer, and not upon the default; ſo that if the Year-Book of *Henry the Sixth* be law, as ſure it is, judgment is as much to be given upon default in perſonal actions as in real, only that there muſt be two defaults in a real action, and but one in a perſonal one. If the party come in upon proceſs in a perſonal action, or upon a *cepi corpus*, or *exigent*, and day is given *prece partium*, that is, by conſent of parties, at which day default is made, no judgment can be given (*c*). Why? Becauſe there is no declaration. But if it were after declaration, and at the day default had been, it were peremptory. So is the caſe of 7. *Hen.* 6. 19. 41. One in cuſtody of the marſhal upon *a præmunire*, is charged by *bill* in nature of

See 5. Com. Dig. "Pleader" (B. 11.).

(*a*) Year-Book 18. *Edw.* 4. pl. 7.
(*b*) Year-Book 36. *Hen.* 6. pl. 19. and 19. *Hen.* 6. pl.
(*c*) Year-Book 19. *Hen.* 8. pl. 16. See Tidd's Pract. 219.

STAPLE *against* HEYDON.

an *appeal of mayhem*, and day is by conſent of parties; at which there was a default: there could not be *judgment final*, becauſe, though he had been charged in cuſtody of the marſhal, yet he never had been in court; but if the default there had been upon an imparlance, it had been peremptory, and final judgment had been thereupon. Indeed, in annuity, which though perſonal, yet partakes of the nature of a real action (for there is final judgment given to recover an inheritance, and the proceſs in annuity therefore imitates that of a real action), after default there ſhall be a *diſtringas ad audiendum judicium* to afford the defendant an opportunity to ſave his default (*a*); becauſe though the recovery ſhall charge the perſon only, yet it may be of an inheritance. So in a *ſecta ad molendinum*, if the defendant make default, there ſhall be *a diſtringas* to give him liberty to ſave his default; for that alſo follows the nature of a real action, as being of freehold or inheritance (*b*).

*[9] * Aye, but this is like an *enquiry of damages*. FIRST, If judgment be againſt a defendant, and an enquiry of damages, he has no day given him thereupon, and therefore he can make no default; for the Court have already given their judgment againſt him, and he thereby is quite out of court, and the enquiry is only to aſcertain the damages. But where there is both iſſue and demurrer, and, before judgment on the demurrer, a *venire facias* goes to try the iſſue, and inquire of damages, whereupon defendant has day, on which he makes default, is not that a default to the day of demurrer as well as of iſſue? for though they be in truth different, *viz.* one the *day of niſi prius*, and the other the *day in bank*; yet, in conſideration of law, they are the ſame. If there be two defendants who plead ſeverally, and one of them demurs, and judgment is given againſt him before iſſue joined with the other, then he againſt whom the judgment paſſed has no day in court, yet the plaintiff may continue proceſs againſt the other; but if, in that caſe, the iſſue were to be tried before judgment, then the defendant who demurred has a day, and that is the ſame that the other has by the *niſi prius*; which by law is the ſame with the *day in bank*. A default in a real action at the *day of niſi prius* is the ſame as at *a day in bank*, and as fatal; for they are not to be ſevered. And why not ſo in a perſonal action? And it is incident to the trial of the iſſue, to inquire of the damages upon the other iſſue in law. So if the *day of niſi prius* be the ſame with the *day in bank*, the two have the ſame day; but here, though it be one defendant, yet you would have him be out of court as to iſſue, by reaſon of default at *niſi prius*, and in court upon the demurrer in the *day in bank*; that is, in and out of court the ſame day. If there be default after demurrer joined, judgment ſhall be upon the default, or upon the demurrer; and when continuance is given, the appearance of both parties are entered at the continuance-day, and anciently they uſed to demand the parties; ſo then they lay at lurch for one another; but now theſe are things of courſe (*c*).

Judgment upon default after demurrer joined, &c.

(*a*) Co. Lit. 144. b.
(*b*) Fitz. Nat. Brev. 123. a.
(*c*) 1. Com. Dig. "Abatement" (I. 24.) (I. 35.).

And

STAPLE *againſt* HEYDON.

And whereas my BROTHER POWELL affirms, that there can be no day on the demurrer but the *day in bank*; I would ſuppoſe there are two defendants, one pleads to demurrer, and the other pleads to iſſue, and *venire facias* goes to try the iſſue, and inquire of contingent damages, before the day of *niſi prius* and *puis darrein continuance* a releaſe is made by the plaintiff to the defendant that demurred; can he plead it at *niſi prius?* And if he fail in doing it, can he plead it *in bank at day* there?

Vide Hob. 81. Poſt. 102.]

And POWELL, *Juſtice*, *ſubito* allowed that he might plead it at *niſi prius*, but not *in bank*; but after ſeemed to doubt, whether after demurrer, a plea *puis darrein continuance* could be pleaded? If at a day given upon a writ of error the defendant makes default, the writ of error may go on, and the judgment be affirmed; becauſe it is no new judgment that is given for the defendant, who is now out of court by his default, but only his former judgment affirmed and ratified; but in that caſe it * were hard to give the defendant coſts upon the ſtatute: ſo if a defendant make default, the plaintiff may have judgment; for a man that is out of court may have a judgment given againſt him, though not for him: and he wiſhed the defendant's Counſel to take care how they made default; for after default, though the plaintiff could not prove his declaration, ſo as verdict could be for him, yet it were very hard to give the defendant a judgment, for he was out of court.

* [10]

If a defendant confeſs the treſpaſs, but offer matter which would be good if well pleaded, he ſhall not be held to the confeſſion.

At another day, ANOTHER POINT ſtirred in this caſe was, Whether judgment might not be given againſt the defendant upon the iſſue, though looked upon as immaterial, and *a jeofail*; becauſe the defendant confeſſed the treſpaſs in his plea, and made no good juſtification: ſo (as was urged) judgment ought to be given againſt him by confeſſion.

Hob. 69. 1. Salk. 173. Ld. Ray. 18. 10. Mod. 227. 273. 11. Mod. 147. Comy. 548. Stra. 873. 5. Com. Dig. "Pleader" (Y. 2.).

And herein HOLT, *Chief Juſtice*, took a diverſity: If one confeſs the cauſe of action, but plead matter, which, if well pleaded, would bar the plaintiff, there it were hard to hold the defendant to ſuch confeſſion, and give judgment againſt him; as here the defendant indeed confeſſes the treſpaſs, but offers ſuch matter, as, if true and well pleaded, would juſtify him: but where the fact is confeſſed, and ſuch matter of juſtification offered, which, though never ſo true and well pleaded, would not bar the plaintiff, there judgment may be upon the confeſſion: as in an action for words for calling the plaintiff "*a thief*;" if the defendant juſtify, for that the plaintiff *received a thief*, and plead it ill, there judgment may be upon the confeſſion, for that matter could not have been ſo pleaded as to have juſtified the words.

Two defendants ſever in pleas, &c. ſo as there can be no repleader.

In the further debate of this caſe THE COURT held, That if there be two defendants who ſever in pleas, and one is found guilty, and an iſſue, not helped by the *ſtatute of jeofails*, is tried for the other, who having made default, is out of court, ſo as there can be no *repleader*, and of conſequence the judgment muſt be to quaſh the writ or bill, it neceſſarily ſhall be abated thereby as

Hob. 54.

to

STAPLE *against* HEYDON.

to the other; for though one defendant may be acquitted in part, and condemned in part of a treſpaſs, or one of two condemned, and the other acquitted, yet the writ cannot abate as to one, and ſubſiſt as to the other; and as to treſpaſs againſt two, when the acquittal or diſcharge of one ſhall diſcharge the other, there is the caſe of *Marler v. Ayliffe (a)*, treſpaſs againſt two for taking a gun and a dagger, one juſtifies the taking in his own defence, being aſſaulted by the plaintiff, the other pleads *not guilty*, and is found guilty, and damages againſt him, and the other iſſue is found for the defendant; there judgment ſhall be againſt him that is found guilty, for the other's plea does not deſtroy the plaintiff's title for good and all: but if treſpaſs be againſt two for taking the plaintiff's goods, and one plead *not guilty*, and is found *guilty*, and the other juſtifies the taking by gift, &c. and his plea is found true, there, foraſmuch as the defendant's plea entirely deſtroyed the plaintiff's cauſe of action, he ſhall have judgment againſt neither.

* [11]

* But on the laſt day of the Hilary Term following, THE WHOLE COURT declared, that they were of opinion, that the iſſue was helped by the *ſtatute of jeofails*, and for ſo much gave judgment for the defendant: and as to the demurrer, gave judgment for the plaintiff without any reaſon.

Vide 2. Saund. 318, 319. 2. Keb. 750. 769. 789. 825.

(*a*) Cro. Jac. 134.

Caſe 2. The Queen *againſt* Foxby.

In an indictment againſt a *common ſcold*, "*calumniatrix*" for "*rixatrix*," is bad. S. C. poſt 178. 213. 239. S. C. 1. Salk. Caſes, 217.

A WOMAN was convicted upon an indictment for being a *common ſcold*.

MOUNTAGUE, in the Trinity Term before, moved in arreſt of judgment, that the indictment was, that ſhe was *communis calumniatrix*, which is not the Latin word for *a ſcold*, but *rixatrix*; and upon this exception, judgment was arreſted this Term.

S. C. Holt, 274. Poſt. 311. 2. Roll. Abr. 79. K. & Fareſt. 52. Blackerby's

Puniſhment for *a ſcold* is *ducking*.

NOTE, The puniſhment of a ſcold is ducking; and HOLT, *Chief Juſtice*, when the exception was firſt made, ſaid, that it was better ducking in *a Trinity* than in *a Michaelmas Term*.

Caſe 3. Anonymous.

Motion to ſtay proceedings cannot be made till bail is put in.

NOTE, One cannot move to ſtay proceedings upon a bond upon payment of principal, intereſt, and coſts, till bail be put in; for till then the parties are not in court (*a*).

Poſt. 25. 60. 101. 7. Mod. 114. 140.

(*a*) By 4. and 5. *Ann.* c. 16. "If, at any time pending an action on a bond for payment of money with a penalty, the defendant ſhall bring into the court where the action ſhall be depending, all the principal money and intereſt due on ſuch bond, and alſo all ſuch coſts as have been expended, &c. the ſaid money ſo brought in ſhall be deemed and taken to be in full ſatisfaction and diſcharge of the ſaid bond, and the Court ſhall and may give judgment to diſcharge every ſuch defendant of and from the ſame accordingly."

Trantor

Trantor *againſt* Watſon.

Caſe 4.

The court of king's bench will not grant a *prohibition* to the court of admiralty before appearance.

A CAPTAIN of a ſhip was taken in his homeward voyage from *Jamaica* by a *French privateer*, and, being under capture, compounded for the ſhip's ranſom with the *Frenchman*. He ſends the ſhip home, and goes himſelf with the captain into *France* for his ſecurity: after the ſhip arrived here, and the goods had paid cuſtom, and were brought from on board, and put into *Trantor's* cuſtody, the defendant ſeized them by proceſs of THE ADMIRALTY to force an appearance *in quâdam cauſâ ſalvagii*.

BROTHERICK, before appearance, moved for *a prohibition*, and cited *Captain Sands' Caſe (a)*, in *King William's* time, where, after great deliberation, the Court granted a prohibition before appearance.

But HOLT, *Chief Juſtice*, ſaid, That that caſe was nothing like this, for that was a proceſs in nature of *an embargo* on a ſhip from going to *the Eaſt Indies*, grounded upon letters patent of King *Charles the Second* to THE EAST INDIA COMPANY, and the ſeizure there was the ultimate end of that proceſs, and it was not to anſwer why they did go, but to ſtop them from going; but the proceſs here is to force an appearance.

But at laſt THE COURT ordered him to give notice within a day or two, and things to ſtay till then.

* [12]

Quære, Whether the captain of a captured veſſel who ranſoms her at ſea, and becomes *boſtage*, may libel in the court of admiralty againſt the ſhip and cargo for the payment of the ranſom.

DARNELL, at another day, moved to diſcharge the rule, and ſaid, that this was a caſe of *ſalvage*; and as the maſter has power to pawn the ſhip upon extraordinary occaſion, ſo he may, in this caſe, ſubject part of the ſhip and cargo to ſave the whole. So the whole queſtion will be, Whether THE COURT OF ADMIRALTY can compel payment of this compoſition? for if they have conuſance of that matter, the * executing the proceſs on land will not vitiate it, if they have original juriſdiction. As if a ſhip be taken as prize, and condemned, and the goods ſold, and after the firſt owner ſues the vendee for the goods, he may ſue him in the admiralty; ſo in caſe of piracy; for the queſtion will be *piracy* or *prize (b)*.

S. C. 1. Salk. 35. S. C. 2. Ld. Ray. 931. Poſt. 25. 79. 162. 3. Lev. 351. 4. Mod. 176. 1. Term Rep. 79.

BROTHERICK inſiſted upon theſe things.

FIRST, That his coming before appearance could not be objected to, for the proceſs was a ſeizure of the goods in order to a condemnation, if by ſuch a time ſecurity be not given to anſwer for the goods in caſe they be condemned. Suppoſe the owner of the goods live at *Jamaica*, and their proceſs is to forfeit the goods if appearance be not in three days, would not this Court grant a prohibition in that caſe?

(*a*) 3. Lev. 351. 4. Mod. 176. 1. Sid. 320. 2. Lev. 25. 1. Lev. 243.
(*b*) Cro. Eliz. 685. 2. Saund. 259. 1. Vent. 173, 174. 308.

SECONDLY,

TRANTOR *againſt* WATSON.

SECONDLY, It is too weighty a point for THE ADMIRALTY to determine, Whether the maſter may ranſom the ſhip from captors (*a*). And this is what will open a way to cowardice, and cheating of owners.

THIRDLY, Though the captain may on occaſion hypothecate the ſhip, he cannot hypothecate the goods.

FOURTHLY, In caſes of *hypothecation*, the party to whom it is made, and not the party who does hypothecate, ſues.

HOLT; *Chief Juſtice.* The maſter has the care of the ſhip, and all the goods on board it; and here, he being under capture in an enemy's hands, and no hopes of a re-taking, the queſtion is, Whether a maſter, under theſe circumſtances, may not compound for a ranſom (*b*), as well as he may throw goods over-board in caſe of a tempeſt? As to the miſchief objected, that ſuch compoſitions prevent re-taking; it is true, a ſhip re-taken upon freſh purſuit, though after a week's time, ſhall be the firſt owners: but, alas! a re-taking is ſo foreign a ſuppoſition that it deſerves but little conſideration. If he then has a power to ranſom the goods, the queſtion next will be, Whether he may retain them as his ſecurity? It may be not; or if he might, and parts with them once, probably he cannot retake them; as in caſe of freight, he may detain them till paid; but if once he ſuffer them out of his poſſeſſion, he may not retake them: then the queſtion will come to this, Whether in caſe it appears to us that this proceſs of theirs be illegal; as ſuppoſe here, inſtead of attaching the goods in the ſhip, they had attached cows or horſes, or houſhold-goods, to compel an appearance in this caſe, and I doubt whether they can attach any other goods to enforce an appearance but the very goods they proceed againſt; if we be then of opinion that they cannot attach other goods, or that they cannot retake theſe goods, ſuppoſe in the hands of a vendee, ought we not, I ſay, in ſuch caſe, though we rarely do it, to grant a prohibition?

1. Salk. 3. 34, 35. 424. Poſt 79. 162. 1. S.d. 418. 1. Vent. 32. 1. Lev. 267. Vide Hob. 12. 42. 115. 8. Co. 147.

POWELL, *Juſtice.* Regularly when one moves for a prohibition, he ought to have a copy of the libel: and if, in any caſe, THE ADMIRALTY can iſſue proceſs againſt goods, it is hard to ſuppoſe this an illegal proceſs; and without we do ſo, we cannot prohibit them. The proceſs is to ſeize the ſhip and goods there, &c. *in quâdam cauſâ ſalvagii*; * and execution is ſuggeſted to be of the goods after they were taken out of the ſhip, in the hands of

* [13]

(*a*) But now by 22. *Geo.* 3. c. 25. "It ſhall not be lawful for any of his "majeſty's ſubjects to ranſom or to "enter into any contract or agreement "for ranſoming any ſhip or veſſel be"longing to any of his majeſty's ſub"jects, or any merchandize or goods on "board the ſame which ſhall be cap"tured by the ſubjects of any ſtate at "war with his majeſty, or by any per"ſons committing hoſtilities againſt his "majeſty's ſubjects. And all contracts "and agreements entered into, and all "bills, notes, or other ſecurities given "for ſuch purpoſes, are declared void, "and the offender ſubject to a penalty "of five hundred pounds."

(*b*) See 22. *Geo.* 3. c. 25 *ſupra.*

another

another perſon; and if a ſhip be hypothecated, in whoſe hands ſoever it comes, it is liable; therefore if goods may be hypothecated, it will be the ſame; and if you have good cauſe of prohibition, giving ſecurity will not hurt you; and if the execution be what proceſs does not warrant, you have your remedy againſt the officer.

TRANTOR *againſt* WATSON.

DR. LANE, *a Civilian*, came the next day to maintain their proceſs; and ſaid, that *redemption* is a ſpecies of *ſalvage*, which is to reſcue by force, or redeem by money. He ſaid, the maſter of a ſhip repreſents the owner and freightors; and if he has ſuſpicion, may detain the goods for his freight. But it is objected, that if he has once parted with them, he cannot by proceſs retake: but we ſay he may; for in this caſe he has not only ſingle poſſeſſion, but alſo an hypothecation of the goods This is a caſe of *redemption* of goods in the power of an enemy, whereof in ſome reſpect they had a property, and might by the law of nations ſink and deſtroy them; ſo that this *redemption* is a prudent new buying of the goods for the advantage of the freightors, by one that by the law and *cuſtom of nations* (for it is not by the *Rhodian* or *civil law*) ought to redeem for the conveniency of merchants, and advancement of trade; and here the maſter has actually paid the compoſition by his body, which he ſubjects to captivity till it be paid; ſo that he thereby gains a right and intereſt in the goods as in goods hypothecated to him, which right follows them in whoſe hands ſoever they go.

THE COURT here interrupted him, and ſaid, The merits of the cauſe was not before them, before appearance and pleading; and it ſeems very reaſonable, that a maſter compounding for goods under theſe circumſtances, ſhould be ſatisfied by the owners, &c. (*a*) and it is ſo in caſe of pirates, *à fortiori* it ought to be in caſe of capture by lawful enemies: beſides, we are upon a proceſs before libel; and if the proceſs be unlawful, you have a double remedy by law, *viz.* treſpaſs or replevin. And the caſe of *Captain Sands* was an action upon the ſtatute after the ſhip was ſtayed; and it is too early for us, upon motion before appearance or libel, to determine the right of their proceſs; and a citation is a ſuit within the ſtatute for which action lies againſt them upon the ſtatute, if they have not juriſdiction of the matter.

1. Salk. 31. 3. Lev. 351. 4. Mod. 176.

POWELL, *Juſtice*, added: This was only a bare proceſs againſt ſhip and goods *in cauſâ ſalvagii*, and we will not diſpute the legality of it upon motion, ſince you have your proper remedy, if it be illegal.

Vide poſt. 25. 79. 162. 238. Carth. 26. 32. 166. 294. 398. 423. 474. 518. Skin. 59. 93. 230. 334. 361, &c.

And ſo, PER TOTAM CURIAM, the rule was diſcharged.

(*a*) See Yates *v.* Hall, Michaelmas Term, 26. *Geo.* 3. that a promiſe by a captain of a ſhip on behalf of his owners, when the ſhip was taken, to pay monthly wages to one of the ſailors, in order to induce him to become a hoſtage, *was* binding on the owners, although they abandoned the ſhip and cargo. 1. Term Rep. 73.

Bangley

Caſe 5.

* Bangley *againſt* Titcombe.

Defendant may be arreſted in trover.

NOTE, There muſt be *ſpecial bail* filed in an action of TROVER and CONVERSION.

2. Stra. 1192. 1. Wils. 23. 335. Say. 53. Tid. P. 33. Cowp. 529.

Caſe 6.

Anonymous.

New notice muſt be given on *new bail* put in. Tidd's Practice, 136. 138.

EXCEPTION was taken to bail, and new bail was put in, and new exception taken to them, but no notice was given thereof; and, Whether notice be neceſſary? was the doubt in practice.

Bail below put in as *bail above*, cannot be excepted againſt. 1. Salk. 98, 99. 102. 2. Salk. 608.

ANOTHER DOUBT was, Whether, if the ſame bail which were taken by the ſheriff be put in to the action, they may be excepted againſt?

Caſe 7.

Dillon *againſt* Browne.

Qu. Upon warrant to confeſs judgment, and an agreement to ſtay execution for a year, how *the year* ſhall be reckoned. Poſt. 16. 288. 1. Salk. 258. 322. 400. Ld. Ray. 281. 480. 5. Com. Dig. "Pleader" (T. 2.).

BROWNE gave a warrant of attorney to *Dillon*, to confeſs a judgment to him; and execution was ſued out thereupon.

It was moved to ſet it aſide for irregularity, upon ſuggeſtion, that it was agreed between the parties, at the execution thereof, that no execution ſhould be taken out till a year after.

THE COURT reflected upon a *gentleman at the bar* who was ſaid to be adviſed with in the tranſaction, becauſe the agreement was not by deed.

But the plaintiff inſiſted on it, that he had ſtayed a year, for the warrant was in a long Vacation, and the judgment was entered as of *Trinity Term* before, and the execution was not executed till after *Trinity Term* following: ſo the plaintiff had waited a year from the judgment entered.

But THE COURT was not agreed, Whether in ſuch caſe the year was to be reckoned from the date of the judgment, or of the warrant? And the matter of fact being referred to MR. CLERKE, he reported, That there was no ſuch agreement made at the time of the warrant given: ſo the execution ſtood.

But *quære*, If, in this caſe, execution be delayed till after the year, a *ſcire facias* be not neceſſary, notwithſtanding the parol agreement? In the caſe of *Booth v. Booth* (*a*), it is held, that it is neceſſary, although execution be ſtayed by injunction (*b*).

(*a*) 1. Salk. 322. S. C. poſt. 288. 258. S. C. 7. Mod. 64.
(*b*) See alſo Withers *v.* Harris, 1. Salk.

Caſe 8.

Joſe *againſt* Mills.

On a demurrer to a juſtification in treſpaſs, and conditional damages taken, if entire damages be aſſeſſed, and any of the treſpaſſes are ill laid, the judgment ſhall be arreſted as to the whole.—5. Co. 58. Stra. 189. 3. Term Rep. 433.

TRESPASS for taking away two cows, and ſeveral loads of wheat, out of the plaintiff's cloſe in *Dale*; *ac etiam* for taking away ſeveral other things *de bonis propriis* of the plaintiff, *ibidem*

ſimiliter

familiter inventus. The defendant pleads *not guilty* as to the two cows, and pleads a ſpecial plea to the reſidue: To which the plaintiff demurs.

JOSE *againſt* MILLS.

The iſſue being firſt tried, the defendant is found *not guilty*, and contingent damages entirely aſſeſſed upon the demurrer.

In treſpaſs for taking two cows at *A.* AND ALſo a load of wheat, *the goods of the plaintiff there found*, theſe latter words apply only to the *wheat*; and therefore the treſpaſs for taking the *cows* is ill laid, in not ſhewing that they were the goods of the plaintiff.

And in *Michaelmas* was twelve-month, when BRANTHWAITE found the Court againſt him upon the demurrer, he took

THIS EXCEPTION, That damages were entirely aſſeſſed; and yet for ſome of the things, *viz.* the loads of wheat, they did not appear to be his goods; for the words "*de bonis propriis* of the "plaintiff," ſhall only go to ſuch things as are after the *ac etiam*; for the goods in the firſt clauſe are ſufficiently deſcribed by giving them *a venue*; and though there be but one *cepit* for both, that will not alter the caſe; for one verb may as congruouſly govern both clauſes when the property of the goods belongs to ſeveral perſons as when to one, ſo that the verb does not *diſtribute the words "*de bonis* of the plaintiff;" and if the fact were, that the goods mentioned in the firſt clauſe had been the goods of a ſtranger, this had been a good declaration: and for authorities he quoted the caſe of *Pinkney v. Inhabitants of Rutland* (*a*), where the plaintiff declared upon the ſtatute of HUE AND CRY, that certain perſons, to him unknown, aſſaulted him, and took ten pounds of "the goods of him the plaintiff, and ſeveral other "goods in particular out of his poſſeſſion took;" and it was held, that he ſhould recover for no more than what he expreſsly laid to be *his* goods, and that what he did not lay to be his own, ſhould be underſtood to be the goods of a ſtranger. In the caſe of *Terry v. Shadwick* (*b*) an action was, *quare clauſum fregit* of the plaintiff and twenty load of hay *ibidem inventus* took away; and after verdict the judgment was arreſted, becauſe it was not laid that the hay was the plaintiff's.

* [15]

S. C. 2. Salk. 640. S. C. 2. Ld. Ray. 890. 1. Ld. Ray. 239. 5. Com. Dig. "Pleader" (3. M. 9.).

WARD, *contra*, quoted 2. *Rol. Abr.* 250. *pl.* 7. Treſpaſs wherefore the defendant at *Dale* "*clauſum ſuum fregit, et intravit, et ſolum querentis adtunc et ibidem effodit, et mille carectat. ſoli ad* "*valenc.* 10*l. et centum pecias maremii ipſius querentis ad valenc'* "200*l. adtunc et ibidem inventus cepit*:" and it was held, that *ipſius querentis* ſhould go to *carect. ſoli*, as well as to *pecias maremii*; and he quoted the writ in THE REGISTER, "*quare liberam wa-* "*rennam* of plaintiff *fregit, et cuniculos cepit*," without ſaying *ſuos*, or *in ea* (*c*). In the caſe of *Rivers v. Odſkirt* (*d*), trover for forty ſhillings in money in a certain purſe, as for his proper goods, without ſaying the purſe was his; yet, after entire damages, and the exception moved in arreſt of judgment, the plaintiff had judgment.

11. Co. 116, 117.

(*a*) 2. Saund. 379.
(*b*) 2. Lev. 156. S. C. 1. Vent. 278. S. C. 3. Keb. 524.
(*c*) See Year Book 43. *Edw.* 3. pl. 13.
(*d*) Cro. Eliz. 568. See Maynard v. Baſſet, Moor, 691.

Jost *againſt* Mills.

THE COURT immediately agreed this laſt caſe to be law; for the purſe ſhall neceſſarily be intended to be his whoſe the money was.

HOLT, *Chief Juſtice*, held the exception fatal, but the reſt would be adviſed.

The caſe being ſtirred again in Trinity Term, ALL THE COURT held the exception fatal, and ſaid the caſe was no more than this: A plaintiff in treſpaſs declares, that the defendant took away two cows from his land in *Dale*, and alſo two horſes of the goods of the plaintiff from the ſaid *Dale*; ſo that laying *a venue* for the taking of the two cows cloſes up the ſentence, and interrupts it, being coupled with the ſecond ſentence, or the matter of deſcription which follows; and the plea does not confeſs them to be the goods of the plaintiff, for that only juſtifies the taking; which might well be, though they were the cattle of a ſtranger; and relied on the caſe of *Cutforthay v. Taylor* (*a*), and *Terry v. Stradwick* (*b*). And the caſe of 2. *Rol. Abr.* 250. was agreed for good law, but not like this, for there was but one *venue* for both; and then the queſtion was, Whether the judgment ſhould be for the defendant for all, in which caſe he muſt have full coſts, or only for defendant upon the iſſue, and a *nil capiat per billam* upon the whole demurrer, ſo as the plaintiff ſhould not be finally barred, but might begin *de novo?* For if it were not for the entirety of damages upon the demurrer, the defendant ſhould have judgment for what was ill declared, and the plaintiff for the reſt.

Hob. 82.

Cro. Jac. 46, 47. Yelv. 36.

3. Bulſt. 303. 2. Lev. 20.

And now this Term THE COURT gave judgment final for the defendant upon the iſſue; and as to the whole demurrer, *nil capiat per billam quia narratio præd. minus ſufficiens, &c.* that is, ſuch a judgment as is upon an arreſt of judgment.

(*a*) Ray. 395. (*b*) 2. Lev. 156.

* [16]

Caſe 9.

* Anonymous.

If an attorney appear without warrant, the appearance is good; but he is liable to an action.

IF an able and reſponſible attorney appear for another without a warrant, and judgment is againſt him, the judgment ſhall ſtand, and the party ſhall be put to his action againſt the attorney; but if the attorney be a beggar, or in a ſuſpicious condition, the Court will ſet aſide the judgment.

S. C. 1. Salk. 88. Poſt. 42. 86. 1. Salk. 86. 5. Mod. 205. Fitzg. 191. 1. Term Rep. 62.

Caſe 10.

Holderſtaffe *againſt* Saunders.

An attachment will not lie in the firſt inſtance againſt an attorney for procuring one to be turned out of quiet poſſeſſion.

HOOPER, *Serjeant*, moved for an *attachment* againſt AN ATTORNEY and ſome others, who had got one in quiet poſſeſſion turned out, thus:

He got one to come upon the land, who aſſumed the name of the *tenant in poſſeſſion*, and owned himſelf to be the man, and got

S. C. Poſt. 73. S. C. Holt, 136. Savil, 31. 1. Com. Dig. "Attorney," (B. 15.) Stra. 402. 705.

got the *common affidavit* of ſervice to him by the borrowed name, as *tenant in poſſeſſion*, having delivered a declaration to him before, and thereupon got judgment againſt the *caſual ejector*, and turned the tenant, who was wholly ignorant of all, out of poſſeſſion.

HOLDER-STAFFE *againſt* SAUNDERS.

Upon affidavit of this matter, all the accomplices were ordered to attend; for though the Court looked upon it as a very great offence, they would not at firſt grant *an attachment*; but ſaid, that it being in a criminal matter, if endeavours were uſed to ſerve them with the rule, and they could not be found, upon affidavit of that matter, they would grant *an attachment*, without requiring perſonal ſervice.

HOOPER, *Serjeant*, then inſiſted to have it part of the rule, that they ſhould not move for *an injunction* in chancery in the mean time, for that would hinder the further inquiry of this practice.

If perſons fraudulently procure a man to be turned out of poſſeſſion by means of a *fictitious ejectment*, and a rule is granted to ſhew cauſe why an *attachment* ſhould not iſſue, the Court will not make it part of the rule, that they ſhall not move for an *injunction* in the mean time.

But THE COURT ſaid, they could not do that, for that would be to ſend an *injunction* into chancery; but they ſaid, that when the Court had a hank over a man, and he came for a favour to the Court, they often refuſe to grant him that, without he conſented not to go into chancery; and that if after ſuch conſent he would go, they would ſend *an attachment* againſt him for a contempt.

And HOLT, *Chief Juſtice*, ſaid, Surely chancery will not grant an injunction in a criminal matter under examination in this court; and that if they did, this Court would break it, and protect any that would proceed in contempt of it: and he ſaid, he thought that copies of theſe affidavits upon which the rule was made here, and an oath of their being true copies, ought to be ground ſufficient to ſtay the chancery from granting an injunction.

Anonymous.

Caſe 11.

IN an attachment of privilege by THE MARSHAL, he ſhall have no attorney, becauſe preſent in court.

Attachment of privilege by THE MARSHAL.

Anonymous.

Caſe 12.

A CLERK IN COURT may confeſs an indictment for his client.

Confeſſing an indictment.

Ante, 14. 1. Bac. Abr. 187.

* Corniſh *againſt* Marks.

* [17]

Caſe 13.

IF *a feme covert* be arreſted, let the cauſe of action be what it will, ſhe ſhall be diſcharged upon common bail (*a*). But if the *huſband* be arreſted, he ſhall not be diſcharged by giving bail for himſelf, without giving of it for his wife likewiſe (*b*).

In action againſt *huſband* and *wife*, *he* alone is liable to be arreſted. 1. Lev. 1.

1. Mod. 8. Poſt. 86. 105. Tidd's Pract. 49. 2. Bac. Abr. 811.

(*a*) Roberts v. Andrews and his Wife, Stra. 1272. 2. Bl. Com. 720. ſee Clerk v. Nutt and his Wife, 1. H. Bl. Rep. 235. *contra*.

(*b*) 1. Salk. 115. 7. Mod. 10.—But

Caſe 14.

The Queen *againſt* Bethell (*or* Porter).

If a defendant be convicted at the ſeſſions on an indictment for a miſdemeanor, and a *capias pro fine* be iſſued againſt him, he ſhall not have a *certiorari* to remove the record; and if one hath iſſued, the Court may grant a *procedendo*; but, on convictions where a *writ of error* does not lie, the Court will, in general, grant a *certiorari* after verdict and before judgment.

S. C. Sett. & Rem. 220.
S. C. Holt, 157.
S. C. 2. Ld. Ray. 937.
S.C. 2. Salk. 549.
Poſt. 33. 40. 61. 83.
1. Vent. 33. 171.
1. Sid. 419.
1. Cro. 314. 377.
Andr. 27.
Stra. 849. 900.
1. Bl. Rep. 233.
2. Burr. 1042.
2. Term Rep. 735.

THE DEFENDANT was convicted upon an indictment before juſtices of the peace, and, not being preſent, no judgment could be given; but a *capias pro fine* was awarded; and then he by a *certiorari* removed up the conviction.

NORTHEY, *Attorney General*, moved for a *procedendo*; becauſe he ſaid, *certiorari's* uſually went to remove *indictments*, &c. before trial, but not to remove *convictions*; for the conſequence of that would be miſchievous, that this Court, which having not tried the cauſe could not be truly apprized of its nature, ſhould ſet the fine, which ought by law to bear ſome proportion to the quantity of the offence.

But BROTHERICK firſt ſaid, that it was very frequent to remove *convictions* before judgment, and that in this caſe there could be no inconvenience in point of ſetting the fine; for it being upon 13. & 14. *Car.* 2. c. 11. the fine is aſcertained thereby, *viz.* a year's impriſonment, &c.

HOLT, *Chief Juſtice*. The writ of *certiorari* goes every day to remove convictions, on which a *writ of error* does not lie, for that is the party's only remedy, and the reaſon regularly why *convictions* are removed by *certiorari*: but *certiorari's* have alſo gone where a *writ of error* would have lain to remove *a conviction*; as to plead a pardon, or for other ſpecial reaſon (*a*). And he remembered a caſe in CHIEF JUSTICE SCROGGS' time, where a *certiorari* was ſent out of this court to remove *a conviction* upon an indictment before judges of aſſize, and that the Court gave judgment; it was for *words* (*b*); and there a *writ of error* would have lain; for wherever *a conviction* is upon an indictment, a *writ of error* will lie thereof. And he ſaid, the courſe of THE CROWN OFFICE was to remove judgments of attainder, &c. by *certiorari*, and bring a writ of error *coram nobis*; and ſo it was in the caſe of *Mr. Hampden* and ſeveral others. But there being no ſuch ſpecial reaſon in this caſe, let a writ of *procedendo* go (*c*).

If a *new penalty* be added to an *old offence*, the indictment muſt be *contra formam ſtatuti*.

And here THE COURT ſaid, that where a ſtatute takes notice of a common-law offence, and adds a further penalty, an *indictment* thereupon may well be laid to be *contra formam ſtatuti*.

The ſeſſions can only proceed as a court.
2. Sid. 32.
1. Vent. 33. 39. 171.

And that where the act gives juſtices power generally to determine a matter at THE SESSIONS, it muſt be according to law, and as a court.

(*a*) See Zink *v.* Langton, Dougl. 749.

(*b*) But ſee Rex *v.* Baker, Carth. 6. *contra*.

(*c*) See Rex *v.* Nicolls, Eaſter Term, 18. *Geo.* 3. that a *certiorari* ſhall not iſſue to remove an indictment for a conſpiracy from the ſeſſions after conviction and before judgment, 2. Strange, 1227.—See alſo Rex *v.* Sparrow, that the Court will not grant a *certiorari* to a defendant after he has appealed to the ſeſſions pending the appeal, 2. Term Rep. 196. *notis*. Dougl. 553.

The

* The Queen *againſt* The Warden of the Fleet.

Caſe 15.

THE RECORD of iſſue and pleading coming hither in *Hilary Term*, in the eleventh year of *William the Third*, was, through miſtake, put upon the file of *Michaelmas Term*.

Miſtakes in filing records rectified.
Poſt. 164. 268. 275.
Stra. 141. 261. 833. 1077.

But IT WAS ORDERED to be put on the right file, the miſtake appearing plain to the Court.

And POWELL, *Juſtice*, quoted two caſes where *venires* were to wrong records, but ſet right by the Court.

White's Caſe.

Caſe 16.

DEE moved for a *mandamus* to reſtore *White* to the place of clerk to THE COMPANY OF BUTCHERS in *London*; it being alledged, that this was a charter-office, in which the party had a freehold: and he quoted the caſe of an attorney of an inferior court, where it goes.

A *mandamus* does not lie to reſtore a perſon to the office of clerk of a Company.
S. C. 3. Salk. 232.
S. C. 2. Ld. Ray. 1004.
5. Mod. 404. 452.
1. Vent. 82. 331.
Fitzg. 123. 194.
Stra. 159. 557. 797. 1082.

HOLT, *Chief Juſtice*. That caſe differs from this: For, FIRST, the office of an attorney concerns the public, for it is for the adminiſtration of juſtice: and, SECONDLY, he has no other remedy. But yours is altogether private; and if it be a freehold, you may have *an aſſiſe* or *an action on the caſe*; and a *mandamus* ought not to go where the office is private, or where the party may have *an aſſiſe*. Indeed it has gone for a *regiſter* in an eccleſiaſtical court, but it was againſt my will (*a*).

(*a*) S. C. 3. Salk. 232. agrees, that the *mandamus* was denied; but S. C. 2. Ld. Ray. 1004. ſays, that in Trinity Term the *mandamus* was granted; for the Court ſaid, it was the ſame caſe with that of a *town-clerk*, for which ſee Poph. 176. 1. Vent. 77. 82. Stiles, 457. 1. Sid. 14. But as to the principal point ſee Rex *v.* Mayor of London, 2. Term Rep. 182. *notis*, and Rex *v.* Mayor of London, 2. Term Rep. 177.

Anonymous.

Caſe 17.

NOTE. It is A RULE OF THE COURT, that if iſſue be joined four Terms, and no proceedings thereupon by the plaintiff, there ought to be a Term's notice before trial.

If, after iſſue joined, no proceedings by the plaintiff be had for *four Terms*, the defendant is intitled to *a Term's notice* of trial, and the Term in which the iſſue is joined is *inclusive*; but notice at any time within *the year*, though countermanded, is a *proceeding* within four Terms. Poſt. 57.—1. Mod. 1. 1. Salk. 487. 2. Salk. 645.

A caſe happened, that iſſue was joined in *Trinity Term*, and notice of trial in *Hilary Term*; but it was afterwards countermanded, and a new notice given in the *Trinity Term* after, and the iſſue tried at the ASSIZES.

And it was now moved to ſet aſide the verdict as irregularly obtained.

THE FIRST QUESTION was, Whether the Term of which iſſue was joined ſhould be reckoned one of the four Terms? for

ANONYMOUS. if it ſhould, this trial was irregular; in caſe the notice in *Hilary Term* was not to be looked upon as a proceeding, then the trial had been irregular, and as ſuch ought to be ſet aſide.

And PER CLERICOS OMNES, the Term of which the iſſue is joined is not to be reckoned one of the four Terms.

(a) See Milbourne v. Nixon and Others, 2. Term Rep. 40.

And PER EOSDEM, notice of trial any time within *the year*, though after countermanded, is a ſufficient proceeding to bring the plaintiff out of the rule; for the end of the rule is, that the defendant ſhould be put in mind of the cauſe, which a notice, though countermanded, does *(a)*.

Ancient rule of fourteen days notice to be obſerved.

IT WAS ALSO HELD by *the Court* and *the clerks*, that the right and ancient courſe is, that if THE ASSIZES happen within fourteen days after Term, fourteen days notice is not requiſite; but that where it could be, it ought to be; that is, where THE ASSIZES do not happen within fourteen days.

But IT WAS AGREED now, that they uſed to give but eight days notice of trial, though the cauſe lay ever ſo remote.

THE COURT ſaid, this was very miſchievous; and therefore it was ordered to obſerve the old rule.

If a cauſe ſleep four Terms before iſſue joined, there muſt be a Term's notice.

If a cauſe ſleep four Terms before iſſue joined, there muſt be a Term's notice before judgment can be ſigned: if after iſſue joined, there muſt be like notice before trial; but to make the notice regular within the four Terms, it muſt be within the laſt Term *ſedente Curiâ*.

Poſt. 57.
2. Salk. 650. 5. Com. Dig. "Pleader" (R. 17.).

* [19]

Caſe 18.

* Crowder *againſt* Oldfield.

A declaration, in an action on the caſe, for diſturbance of common, ſtating, that the plaintiff was *ſeiſed* of *lands* parcel of ſuch a manor, and that he held them by copy of court roll as a cuſtomary tenant, according to *the cuſtom* of the ſaid manor, and that he had, in reſpect thereof, a *right of common* by cuſtom on ſuch a part of the manor, is good, *after verdict*; for, as the lands are alledged to be *parcel of the manor*, they ſhall then be intended *copyhold*, though the eſtate is not repreſented to be held at *the will of the lord*.—S. C. 1. Salk. 170. 364. S. C. 3. Salk. 13. S. C. N. Lut. 46 S. C. Holt, 146. S. C. Lex. Man. App. 130. S. C. 2. Ld. Ray. 1225. S. C. Ray. Ent. 489. 9. Skin. 406. Cartn. 432. 83. 270. Poſt. 63. 313. 4. Mod. 418. 12. Mod. 35. 1. Ld. Ray. 386. 406. 2. Ld. Ray. 1145. 1231. 5. Com. Dig. "Pleader" (C. 39.). 1. Bac. Abr. 394.

UPON a writ of error from the common pleas the caſe was thus:

The plaintiff, in an action on the caſe for hindering him of his common, declared, that he was ſeiſed of a meſſuage and ten acres of land, with the appurtenances, in *Northram*, in the county of *York*, parcel of the manor of *Northram*, in the ſame county, and that he held them by copy of court-roll of that manor as a cuſtomary tenant in fee-ſimple, according to the cuſtom of the ſaid manor; and that he, the plaintiff, had and ought to have, &c. and all the cuſtomary tenants of his ſaid tenement, with the appurtenances, by the afore-

ſaid

ſaid cuſtom, *præd. a tempore cujus, &c.* uſed and approved, had, and ought to have, a *common of paſture* in a certain paſture or moor called *Warmlees* parcel of the ſaid manor, and containing forty acres in *Northram* aforeſaid, for all his commonable cattle, upon the ſaid cuſtomary tenement *levant et couchant, &c.* as appurtenant to his ſaid tenement; and that the defendant at ſuch a time, with intent to deprive him of his ſaid common, did incloſe parcel of the ſaid place, &c.

Upon *not guilty*, there was a verdict for the plaintiff; and the judgment was arreſted in the common pleas, becauſe he made a title by *cuſtom*, and did not ſhew that he was a copyholder; for he did not ſhew that he held *ad voluntatem domini* (*a*).

LUTWYCHE, *junior*, *for the plaintiff* in error.

FIRST, None can claim common by cuſtom generally but a copyholder; and he ought, in making title, to ſhew his eſtate to be a copyhold, that is, *demiſed and demiſable*, and held *ad voluntatem domini, &c.* (*b*). But this is an action upon the caſe againſt a ſtranger, and upon the poſſeſſion.

SECONDLY, It is *after verdict*; and the laying *a cuſtom* is, in this caſe, only an inducement to the action; and inducements need only be ſet out in ſubſtance, for the wrong done to our poſſeſſion is the giſt of the action: and he quoted the caſes of *Dent v. Oliver* (*c*), *St. John v. Moody* (*d*), *Saunders v. Williams* (*e*), *Baker v. Breveman* (*f*), *Bayley v. Hughes* (*g*), *Sands v. Trefuſis* (*h*), and *Stroud v. Bird* (*i*). And though it be laid by way of cuſtom, and ill as ſuch, it may be well by preſcription, according to the caſe of *Day v. Savage* (*k*), and the caſe of *Eſcot v. Lannery* (*l*), where, in caſe, the plaintiff declared, that *Lord Berkley* demiſed to him all his fairs for twenty-one years, and that the defendant hindered him from taking his toll; and though it was excepted, that he had not laid any title in *Lord Berkley*, yet becauſe it was upon *the poſſeſſion*, in which the right did not come in queſtion, the plaintiff had judgment. In the caſe of *Merchant v. Whitpane* (*m*), in caſe, for diſturbance of a ſeat in the church, without ſaying it was an ancient one, the exception was over-ruled, becauſe it was againſt a wrong-doer and upon the poſſeſſion. In an action on the caſe (*n*) for diſturbance in an office, to which the plaintiff made a ſpecial title, and the jury found a title variant, yet plaintiff had judgment, becauſe the title was not material. * A verdict will ſupply whatever muſt of neceſſity have been proved at the trial (*o*); and he quoted the caſe of *Roſwell v. Pryor*, in *Trinity Term*, in the tenth year of *William the* * [20]

(*a*) See this caſe in the common pleas, 1. Lutw. 125.
(*b*) Foiſton v. Cratchrod, 4. Co. 31.
(*c*) Cro. Jac. 43.
(*d*) 1. Vent. 275.
(*e*) 1. Vent. 319.
(*f*) Cro. Car. 418.
(*g*) Cro. Car. 137.
(*h*) Cro. Car. 575.
(*i*) In Mich. Term, 7. *Will. & Mary.*
(*k*) Hob. 86.
(*l*) Owen, 109.
(*m*) 2. Lev. 193.
(*n*) Ferrar v. Johnſon, Cro. Eliz. 336.
(*o*) See Spires v. Parker, 1. Term Rep. 141. 145. Dougl. 682. *notis.*

CROWDER *againſt* OLDFIELD.

Third (*a*), in nuiſance for ſtopping of lights, where it was not ſaid to have been an ancient meſſuage, and yet held well after verdict: beſides the *locus ad quem* here is laid to be parcel of the manor, which the freehold is not, and the copyhold is; for the ſervices whereby the freehold is holden is that which is part of the manor, and not the freehold itſelf; and for this he quoted the caſe of *Winter v. Loveden*, in *Michaelmas Term*, in the ninth year of *William the Third* (*b*). *Br. Maner.* 2. 2. *Vent.* 18. *Vide Raym.* 101. 2. *Keb.* 410. 493. 504.

Poſt. 313, 314.

2. Salk. 437.

PARKER *contra*. This caſe has been three times ſolemnly argued in the common pleas, and the whole Court were unanimous in their opinion againſt the plaintiff; for, as he has made his caſe, he has a freehold in the *locus ad quem*; for tenant of land *ſecundum conſuetudinem manerii* ſhall be underſtood a freeholder. 2. *Vent.* 143, 144. 9. *Hen.* 6. 29. 4. *Co.* 31. *b. Foiſton's Caſe.* 2. *Leon.* 29. *Vaugh.* 253.

Cro. Car. 185. 229.

SECONDLY, The verdict cannot help it; for where the title is inconſiſtent, the verdict cannot mend it; and the queſtion here is, Whether a tenant of a freehold holden of a manor may by cuſtom have common in parcel of the manor? *Cro. Car.* 418, 419. *Cro. Eliz.* 180.

HOLT, *Chief Juſtice*. The queſtion firſt is, Whether we ſhall underſtand this cuſtomary eſtate, as pleaded, to be a copyhold eſtate? Of right you ſhould not only have ſhewed, that it was by cuſtom held at the will of the lord, but alſo demiſed and demiſable by him to hold of him, &c. Indeed you ſay, that it is part of the manor, which is a kind of an implication that it is a copyhold; and take it ſo, you have gone, in making title, by way of a *que eſtate*, that all the cuſtomary tenants of that meſſuage, &c. uſed to have common there; and that is a good way of preſcribing, though it be not the uſual way. Then you ſay you ought to have it, as belonging to the land; but if it be looked upon as a copyhold it is not ſo, but it belongs to it as it is a copyhold eſtate; and if the copyhold be infranchiſed, there is an end of the common: ſo that, it being alledged by cuſtom, it is not a common belonging to the land, but to the ſtate of the land. *Vide Yelv.* 189. 119. *Maſſam v. Hunter*, *Cro. Jac.* 253. and abundance of other books; but a copyholder may have common as appendant to the land. If copyholder of one manor has common in waſte of another manor, then he muſt preſcribe in the name of his lord, and ſay, that the lord of that manor whereof he is copyholder, uſed, time out of mind, to have common for him and his copyholders; and there infranchiſement of copyhold does not extinguiſh the common, but it is a derivative right which the copyholder has. ſo if this be taken as appendant to land, infranchiſement will not extinguiſh it; ſo your declaration is repugnant, for you have averred it to be parcel of the manor, and ſo by implication a copyhold: and then the title you ſhew is very bad, and ſuch as a copyholder cannot

5. Mod. 244. 378.

Co. Lit. 58.

Hob. 86. 288.

2. Jo. 276. 287.

Hob. 86.

(*a*) Poſt. 116. S. C. 2. Salk. 459. S. C. Carth. 454. S. C. 1. Ld. Ray. 392. 713. S. C. 12. Mod. 215. 635.

(*b*) 2. Salk. 537. S. C. Carth. 427. S. C. 5. Mod 244. 378. S. C. 1. Ld. Ray. 267. S. C. 1. Freem. 507. S. C. Com. Rep. 37.

make;

make; for you ſhould have ſhewed that the cuſtom of the manor was, that every copyholder of this tenement, or of the manor in general, uſed to have common, &c. CROWDER *againſt* OLDFIELD.

* POWELL, *Juſtice*, who was of the common pleas when judgment was there given, agreed, that one may declare in an action for damages upon his *poſſeſſion*, without any further title againſt *a wrongdoer*; and he agreed the caſe of *Burt v. Stroud*, upon *a legitime poſſeſſionatus* for hindrance of common, to be good, becauſe it was againſt a ſtranger and a wrongdoer; but againſt the *owner of the ſoil* you muſt make *title*; and ſo in *bar* and *avowry*; but where you need not ſhew any *title*, if you go about it, and ſhew an ill or repugnant one, it is at your peril: here your title is, that you are a cuſtomary tenant of a cuſtomary tenement, parcel of a manor; and it is true, after verdict, that will be taken to be *a copyhold*: and if ſo, you are gone that way; for you make title to the common as belonging to *the land*, whereas it ſhould be as to *the eſtate*. * [21] 4. Mod. 418.

And THE WHOLE COURT was clear to affirm the judgment: but at the importunity of the Counſel they gave leave to ſpeak to it again.

Adjournatur (a).

(a) In Hilary Term, 4. *Anne*, THE COURT, after great deliberation, reverſed the judgment of the court of common pleas, and gave judgment for the plaintiff, the fault in the declaration being helped by *the verdict*. S. C. 2 Ld. Ray. 1232.

The Mayor of Wincheſter *againſt* Wilks. Caſe 19.

AN ACTION UPON THE CASE was brought againſt *Wilks* for uſing the trade of a *woollen-draper* within the corporation of *Wincheſter*, contrary to the *cuſtom* thereof; which was, that none who had not ſerved ſeven years to a trade, or had been free of the guild of merchants, ſhould uſe it within the corporation.

Quere, Whether *a cuſtom* that no perſons, except thoſe who are free of the city, ſhall exerciſe a trade therein, be good.

NOTE, It was not grounded upon any bye-law, or for any penalty.

After verdict for the plaintiff, a motion was made in arreſt of judgment, that ſuch action does not lie; and *Cro. Eliz.* 803. and the *Caſe of the Corporation of Totneſs* were cited upon the point.

S. C. 1. Salk. 203. S. C. 3. Salk. 349. S. C. Holt, 187. S. C. 2. Ld. Ray. 1129. 11. Co. 53. 1. Leon. 262. Palm. 1. 2. Lev. 33. 1. Salk. 193. 6. Com. Dig. "Trade" (D. 2.).

But THE POSTEA being not put in, THE COURT ordered them to ſtay till it came in, and then to have it put in THE PAPER, and ſolemnly debated.

For HOLT, *Chief Juſtice*, ſaid, it was a point not determined, whether ſuch a cuſtom be good, though many corporations pretended to it: and he ſaid, that ſome corporations pretended to a right by cuſtom to exclude foreigners, but he thought they could not ſupport it.

And in *Eaſter Term*, in the fourth year of the queen, judgment was ſtayed upon faults in the declaration (*a*), and THE COURT declined

(*a*) See S. C. 2. Ld. Ray. 1129.

THE MAYOR OF WINCHESTER *againſt* WILKS.

clined ſaying any thing upon the merits, which they ſaid was a queſtion of great conſequence.

Caſe 20.

Hotherſhell *againſt* Bows.

A priſoner retaken on eſcape, cannot pay money into court. Poſt. 301.

THE DEFENDANT being in cuſtody upon *meſne proceſs*, and having eſcaped, was taken upon a warrant by virtue of the late act of parliament, 5. *Anne*, c. 9.

RAYMOND moved, that, upon bringing the money into court, he ſhould be ſet at liberty.

But THE COURT ſaid, they could not do it.

Declaring againſt one that comes in by *hab. corpus*. S. C. Holt, 705. 2. Salk. 352. Poſt. 254. Tidd, 200.

MR. CLERKE, upon this occaſion, ſaid, that if a man come upon a *habeas corpus*, and the plaintiff do not declare in two Terms, the defendant ſhall be diſcharged upon filing of common bail without any rules; and if one come in upon *habeas corpus*, though he after put in bail, if it be not at the return of the proceſs he cannot give rules, but * muſt wait two Terms, and then, if there be no declaration, he ſhall be diſcharged upon common bail, without coſts; whereas if he had put in bail at the return of the proceſs, he might ſpur them on by rules; or if the plaintiff had without rules paſſed two Terms without declaring, he ſhould pay coſts.

* [22]

5. Com. Dig. "Pleader" (C. 2.).

And THE COURT ſaid, the rules were very hard upon one in cuſtody; and they ſaid, it was not the intent of the act to make eſcaping priſoners pay the debt right or wrong, or to lie in jail for ever.

Vide Poſt. 63. 95. 154.

And therefore ordered MR. CLERKE to draw up a rule, that in caſe a plaintiff did not declare in two Terms he ſhould be *nonpros'd*.

And thereupon the defendant diſcharged.

Caſe 21.

Anonymous.

Rules upon a declaration delivered in Hilary Term. Poſt. 33. 153. 1. Salk. 219. 2. Salk. 514, 515. 518.

NOTE, If a declaration be delivered of *Hilary Term*, and rules of pleading given, if the defendant do not plead before the *eſſoin-day* of *Eaſter Term*, the plaintiff may ſign judgment for want of a plea; but if the plaintiff in that caſe has not given rules in *Hilary Term*, he muſt give them in *Eaſter Term* before he can ſign judgment.

Caſe 22.

Anonymous.

No new trial after ſecond verdict on the ſame ſide. 2. Salk. 649. Poſt. 242.

PER HOLT, *Chief Juſtice*. After a ſecond verdict on the ſame ſide, it is not fit to grant *a new trial* becauſe the Judge did not like the verdict; but if there were any practice uſed in obtaining it, it is otherwiſe (*a*).

5 Com. Dig. "Pleader" (R. 17.).

(*a*) See the caſe of Goodwin *v.* Gibbons, 4. Burr. 2108.

Anonymous.

Anonymous. Caſe 23.

PER HOLT, *Chief Juſtice.* If A BOND be of twenty years ſtanding, and no demand proved thereon, or good cauſe of ſo long forbearance ſhewn, upon a *ſolvit ad diem* I ſhall intend it paid; *à fortiori* upon A NOTE, if it be any conſiderable ſum.

A bond or note of *twenty years* ſtanding ſhall be *preſumed* paid.

Ld. Ray. 1033. 8. Mod. 278. 10. Mod. 2. Gilb. Eq. Rep. 224. 3. Peer. Wms. 288. Strange, 826. 1. Burr. 434. 4. Burr. 1963.; and ſee Oſwald v. Legh, 1. Term Rep. 270. *in point.*

Warren *againſt* Fuzz. Caſe 24.

PER CURIAM. A new trial ought not to be granted for want of evidence which the party might have had at trial, and had not; but if it be proved that endeavours have been uſed, but prevented by ſome unforeſeen accident, as ſickneſs of the witneſs, &c. it may be good cauſe of new trial. See the caſe of *Ford v. Tilly*, 2. *Salk.* 653. *Fareſt.* 156, 157.

The Court will grant *a new trial* if material witneſſes were prevented from attending.
Poſt. 222. 224.

1. Mod. 220. 288. 325. 10. Mod. 202. 11. Mod. 111. 118. Fitzg. 40. Strange, 691. 5. Com. Dig. "Pleader" (R. 17.).

Noell *againſt* Gray. Caſe 25.

ONE who had been diſcharged upon the act of poor priſoners, gave bail to an action of debt upon a bond with which he was charged in priſon, and confeſſed the action, and that execution might go againſt his goods, &c. The plaintiff takes execution againſt the goods, and likewiſe ſues the bail, who ſurrender their principal in diſcharge; and this appearing upon motion,

Bail are diſcharged by their principal having the benefit of an inſolvent debtors act.
Poſt. 301.

THE COURT ſaid, that bail were actually diſcharged by the pleading and judgment, and ordered him to bring the record of the judgment into court whereupon he was taken in execution, and that they thereupon would diſcharge him.

1. Salk. 345. 2. Salk. 521. Ld. Ray. 1088. Stra. 1233.

* [23]

* Baker *againſt* Pierce. Caſe 26.

ACTION ON THE CASE for theſe words: "You ſtole my "box-wood, and I will prove it."

To ſay, "You "ſtole my box-"wood, and I "will prove it," is actionable. S. C. 2. Salk. 695. S. C. Holt, 654. S. C. 2. Ld. Ray. 959. Poſt. 104. 202. 1. Jones, 11. Allen, 11. Poph. 211. Hob. 305.

DARNELL moved in arreſt of judgment, that the words are not actionable; for he urged, that the words "You ſtole my wood," and "You ſtole my timber," are the ſame (*a*): "You are a thief, "and ſtole my timber (*b*):" "You are a thief, and ſtole my corn, "hops, apples," not actionable (*c*). For where words charge one either with treſpaſs or felony, if there be not other words that ſhew the charge to be felony, the beſt ſenſe ſhall be taken. So if it be, "You ſtole my timber out of my yard (*d*), hops out of my bag (*e*), "corn out of my yard, &c. (*f*)," it will not bear action (*g*).

(*a*) Cro. Jac. 65. Stiles, 24.
(*b*) Cro. Jac. 65.
(*c*) 2. Brownl. 280. Cro. Jac. 673.; (*d*) Allen, 31. Hob. 331. Stiles, 231.
(*e*)
(*f*) Hob. 406. Cro. Jac. 39.
(*g*) See Clearke v. Gilbert, that "Thou "art a thief, and haſt ſtolen twenty loads "of my furze," are not actionable, Hob. 331.

I charge

BAKER *againſt* PIERCE.

" I charge you with felony for taking money out of *J. S.*'s pocket," not actionable (*a*), becauſe it might be without a felonious intent. (But HOLT, *Chief Juſtice*, condemned that authority.) Beſides, he quoted *Hutton*, 113. " Thou art a thief, and haſt couzened my " couſin of his land," not actionable, though it was ſaid, the ſubſequent words were accumulative, and there all the aforeſaid caſes are agreed not to be actionable. Suppoſe the words were, " You " have ſtolen my coppice-wood (*b*)," will they ſay an action would lie? for it might be coppices cut and carried away with one entire act. So here; for it is not what the party meant here, but the neceſſary import of the words that are to be conſidered.

BROTHERICK *contra*. " You have ſtolen my timber" is actionable (*c*), for it muſt be felled and ſevered from the ſtock before it is timber. And he remembered the old verſe of *Arbor dum creſcit, lignum dum creſcere neſcit* (*d*). Theſe words, " Thou " haſt ſtolen my wood, and I will charge you with felony (*e*)," and, " Thou art a thief, and thou haſt ſtolen a tree (*f*)," not actionable, for a diverſity is taken by the Court between a tree, for that ſhould be underſtood ſtanding, but if it be felled it is wood: and a *præcipe* does lie of *boſcum* (*g*); but it cannot be ſaid, one " ſtole an acre of wood;" and if it were not a thing of which felony could have been committed, we could not have a verdict. See the caſe of *Low v. Saunders* (*h*) upon demurrer.

1. Com. Dig. 252.

HOLT, *Chief Juſtice*. The verdict ſignifies nothing in the caſe, and there are contemporary authorities that differ from my brother DARNELL's. Suppoſe he had ſaid, " He has ſtolen my " underwood?"

POWELL, *Juſtice*. Underwood and coppice-wood will be taken for wood ſtanding.

8. Mod. 24. 30. 371. 10. Mod. 197. Stra. 142. 696. 3c4. 1189.

HOLT, *Chief Juſtice*, ſaid, the opinions of later times have been in many inſtances different from thoſe of former days in relation to words, for formerly there has been a difference taken between ſaying, " * Thou art a thief, *and* haſt ſtolen my wood," and, " Thou art a " thief, *for* thou haſt ſtolen my wood (*i*);" and judgments have gone both ways; but later opinions make no difference, if the words be ſpoke at the ſame time. And theſe are ſcrambling things that have gone backwards and forwards, and the idle people in the country that privately cut and carry away coppice-wood are in common parlance called *wood-ſtealers*. And I have heard my LORD HALE and JUSTICE TWISDEN ſay, that they knew no ſet rule for actions for words, but that all words ſtood upon their own feet (*k*). To ſay, a man has " *the pox*" is not actionable (*l*), but to ſay he has it, and got it by a yellow-haired wench in *Moor-*

* [24]

(*a*) Maſon *v.* Thompſon, Hutton, 38.
(*b*)
(*c*) Yelv. 152. Noy, 114.
(*d*) 1. Roll. Abr. 70. pl. 47.
(*e*) March, 211. Cro. Jac. 116.
(*f*) Hob. 77.
(*g*) Anonymous, Stiles, 9.
(*h*) Cro. Jac. 166.
(*i*) See Hob. 331. and Cro. Jac. 114.
(*k*) 1. Mod. 22. 1. Lev. 280. 3. Sid. 432. 1. Vent. 50. 1. Cro. 509.
(*l*) 2, Com. Dig "Action for Defa-" mation" (D. 29.).

fields,

fields, has been adjudged actionable (*a*); which latter words do not carry a violent intendment that the ſpeaker meant "*the French pox*," but the ſenſe leads more that way than to another (*b*). And he ſaid, that "ſtealing" and "felonioufly ſtealing" was not the ſame; for in common parlance "ſtealing" did not always import felony; as to cut and carry away furze is a ſtealing, but not a felonious taking (*c*). BAKER *againſt* PIERCE.

But POWELL, *Juſtice*, ſaid, he always took it that *ex vi termini* "ſtealing" did import felony, and the ſaid inſtance put by MY LORD was properly *treſpaſs*, and not *ſtealing*.

And at another day, PER TOTAM CURIAM, the plaintiff had judgment, for all the later authorities ran clear for him. Cro. Jac. 674 166. 40. *ac.* Cro. Jac. 66. *cont.*

And HOLT, *Chief Juſtice*, ſaid, it was not worth while to be learned on that ſubject; but ſaid, that for his part, wherever words tended to take away a man's reputation he would encourage actions for them, becauſe ſo doing would contribute much to the preſervation of the peace.

(*a*) 2. Lev. 205.
(*b*) Heb. 117. 268. 1. Jones, 68.
(*c*) See Hob. 77. 331.

Wood *againſt* Shepherd. Caſe 27.

HOLT, *Chief Juſtice*. One ſhould not move in arreſt of judgment until THE POSTEA be brought in; and the defendant ſhould give a rule upon THE POSTEA, which is, in itſelf, a notice to bring it in; and it is againſt the ancient courſe of the Court to make a rule for ſtaying of judgment until THE POSTEA be brought in. By the courſe of the common pleas, the *clerk of the aſſize* keeps it until the days for moving in arreſt of judgment be paſt, and the notice is given him, and he has his fee of ſix ſhillings and eight pence for attending with it, and the *clerk of aſſize* ought to deliver THE POSTEA to none but to the clerk in court; and notice to the clerk in court is good notice. When to move in arreſt of judgment. S. C. 1. Salk. 78. S. C. Holt, 71. 1. Salk. 77, 78. 2. Salk. 431. Poſt. 143. 5. Com. Dig. "Pleader" (S. 47.).

Anonymous. Caſe 28.

NOTE, There are twenty days to except againſt bail after notice. Twenty days to except againſt bail.

Poſt. 230. 1. Salk. 98. Tidd's Pract. 135.

And bail cannot be juſtified before a Judge in his chamber, except it be by conſent, or for neceſſity in Vacation; but in the latter caſe, they ought to be juſtified again in Term. Bail cannot juſtify before a Judge, except by conſent, but muſt appear *perſonally* in court. Poſt. 230.—Tidd's Prac. 137. 2. Bl. Rep. 758. 1064.

And upon that the defendant is compelled to accept a declaration to go to trial at THE ASSIZES, if it be an iſſuable Term.

And

Notice of bail muſt contain their names, places of abode, and myſteries.
Loft, 237. 194.

And upon putting in bail, it is not enough to give notice of their being put in, but it ought to be of their names, places of abode, and trade or vocation, that the plaintiff may know how to enquire after them.

Tidd's Pract. 134. 1. Com. Dig. 680.

And after exception to bail, there is * no ſet time to juſtify or exchange them for better, but it muſt be in convenient time.

Caſe 29.

Butler *againſt* Rolfe.

Time of bringing in principal, intereſt, and coſts.
S. C. 3. Salk. 55.
S. C. Holt, 91.

PER CURIAM. There ought not to be a ſtay of proceedings upon the bail-bond upon bringing principal, intereſt, and coſts into court after notice of trial, without it be brought within ſuch time as the plaintiff may not be delayed of trial (*a*).

(*a*) See Anonymous, ante, 11. Poſt. 29. 60. 101. Salk. 583. 597. 7. Mod. 114. 140.

Caſe 30.

The Queen *againſt* The Mayor of Thetford.

At what time the Court will grant *an attachment* for not returning *a mandamus.*
2. Salk. 429. 434.
Fitzg. 4.
10. Mod. 56.
Stra. 407. 609.

UPON AFFIDAVIT that he had been ſerved with a *mandamus* on the ſecond of *July* before, and made no return,

STONE moved for an *attachment* againſt him, or at leaſt to have the *alias* returnable peremptorily.

CURIA. It is matter diſcretionary in the Court to let people run the line out, and we may make the *alias* returnable *immediatè*, and for contempt thereon grant *an attachment*; or, if we ſee occaſion, we may make the firſt writ returnable, and we may make them returnable *de die in diem*, or we may give ſhort returns; as a *mandamus* returnable in a week, and an *alias* in four days after, and a *pluries* with the like ſhort return (*a*).

(*a*) See Rex *v.* Smithies, 3. Term Rep. 351.; Rex *v.* J. Edyvean, 3. Term Rep. 352.; Rex *v.* Winton, 5. Term Rep. 89.; and 2. Hawk. P. C. ch. 22. ſ. 34.

Caſe 31.

Anonymous.

Action for malicious proſecution will not lie, if there be *probable cauſe.*
Poſt. 216 261.
Ld. Ray. 81. 377. 503.

PER CURIAM. If the perſon be ever ſo innocent, yet if there were *a probable cauſe* of proſecution, an action for *malicious proſecution* will not lie; for it muſt be direct malice, without any colour of cauſe, that will ſupport ſuch an action (*a*). *Vide* 1. *Salk.* 14, 15. 21. 5. *Mod.* 394. 405. 1. *Vent.* 86. *Carthew*, 416.

(*a*) Anonymous, poſt. 73.; Farmer *v.* Sir Robert Darling, 4. Burr. 1971. *accord.*

Ewer

Ewer *againſt* Jones.

Caſe 31.

DEE moved for *a prohibition* to THE COURT OF ADMIRALTY to ſtay a ſuit there for ſeamen's wages.

For a prohibition to the admiralty to a ſuit concerning ſeamen's wages, upon pleading ſtatute of Limitations.

The contract was upon land, and the ſuggeſtion was, that they pleaded the ſtatute 21. *Jac.* 1. c. 16. of *Limitations*, and that THE ADMIRALTY rejected their plea.

And having obtained a rule *niſi* before, it was now offered againſt it, that wherever the common-law courts allow THE ADMIRALTY juriſdiction, they ought not to prohibit them; and here they have juriſdiction, as in caſe of *hypothecation*; and a ſentence in the court of admiralty beyond ſea ſhall be executed by the court of admiralty here. In *Bridgman's Caſe* (*a*), ſuit to ſeize a ſhip for piracy done by the mariners; and though they may ſue at common law in this caſe, yet it is hard to make them do it; for it were in effect to give away their right; for at common law the ſuits muſt be all ſeveral, whereas they may all join in THE ADMIRALTY, and ſo by an eaſy contribution maintain and carry on the ſuit; and beſides, they may ſue the ſhip there, which they cannot do at common law; and the *ſtatute of Limitations* enumerates the actions it limits, and they are all ſuits at common law. It is no bar to a ſuit in equity (*b*) upon a truſt, nor for a legacy, nor * upon a *rationabili parte bonorum*; and the reaſon given for the latter caſe is, becauſe it is not a common-law proceeding, but according to a particular cuſtom, and *à fortiori* when the proceeding is by the civil law. *Mar.* 139. 132. *Hutt.* 109.

S. C. 3. Salk. 227. S. C. 2. Ld. Ray. 937. S.C. Comy. 137. Ante, 11. Poſt. 79. 424. 240. 309. 2. Salk. 415. 424. 1. Salk. 31. 1. Vent. 146. 343. Raym. 3. 2. Roll. Ab. 350. p. 10. 3. Mod. 244. Carth. 166. 518.

* [26]

To this it was anſwered, that it was an indulgence to ſuffer ſeamen to ſue in THE ADMIRALTY for wages; for in the time of *King Edward the Third* prohibitions have gone; and it was firſt agreed, that for a ſuit upon a contract *ſuper altum mare* no prohibition ſhould go upon their refuſing the plea of the *ſtatute of Limitations*; but this was matter ſtrictly cognizable at common law only, in which caſe this plea had been good: and is it not hard by indulgence to them to have defendant barred of his juſt plea?

1. Salk. 33. 2. Salk. 425. Winch, 8.

And this was what ſtuck with THE COURT; and they ſaid, that this being a ſtatute barring of right ought to be taken ſtrictly (*c*).

(*a*) Hobart, 11.

(*b*) See Johnſton *v.* Smith, 2. Burr. 961.; South Sea Company *v.* Wymondſell, 3. Peer. Wms. 143. 2. Eq. Caſ. Abr. 74.; Wych *v.* Eaſt India Company, 3. Peer. Wms. 309.; and Mitford's Pleadings, 2d edit. 212.

(*c*) Now by 4. *Anne*, c. 16. ſ. 17. "All ſuits and actions in the court of "admiralty for ſeamens wages ſhall be "commenced and ſued within ſix years "next after the cauſe of ſuch ſuits or "actions ſhall accrue, and not after; "PROVIDED that if the perſon intitled "to ſuch ſuit or action ſhall, at the time "it accrues, be within the age of twenty-"one years, *feme covert*, *non compos mentis*, "impriſoned, or beyond the ſeas, he ſhall "be at liberty to bring the action within "ſix years next after coming of age, "being diſcovert, of ſane memory, at "large, and returned from beyond the "ſeas, &c. &c. &c."

CURIA.

Property bound by ſentence in admiralty.

CURIA. Without doubt a ſentence in THE ADMIRALTY, where they have juriſdiction, binds the property.

Raym. 473. 2. Show. 232. 1. Vent. 32. 2. Keb. 511. 610. 1. Sid. 418. 1. Lev. 243. 267.

HOLT, *Chief Juſtice*, remembered the caſe of *Hughes v. Cornelius (a)*: *France* and *Holland* were at war, and *the French* took an *Engliſh* ſhip as a *Dutch* one, and the ſhip being ſentenced as prize was ſold by virtue of the capture; and the firſt owner brought an action of *trover*, and the ſentence was given in evidence, and upon ſpecial verdict it was held, that the property was altered by the ſentence.

But to the point in queſtion, whether the ſtatute had been well pleaded, they all ſeemed to incline that a prohibition ought to go upon refuſal of it.

A prohibition will not lie to THE ADMIRALTY for refuſing A PLEA of the *ſtatute of Limitations*, if it be badly pleaded; as, "that it "appeared by "the libel that "the cauſe of "action did not

But as it was here pleaded it was ill, *viz.* that it appeared by the libel that the ſuit was ſix years after the cauſe of action, which was ill; for the time on which it is laid is not material, and therefore the defendant ought not by his plea to hold the plaintiff to the immaterial time, but to plead directly that no ſuit had been within ſix years after cauſe of action accrued; and if, notwithſtanding a matter ill pleaded by you, they go on, why ſhould we prohibit them? Nor ſhall we rather think that they rejected your plea as not at all allowable by their law as to its matter, than becauſe it was bad in ſubſtance, as to the legal manner of pleading it.

accrue within ſix years"—2. Ld. Ray. 838. 1204. Strange, 1078.

Refuſing a plea is, by civil law, good cauſe of *appeal*.

THEY ALSO AGREED, that if they refuſe a plea, which by their law is a good plea, it will be reaſon to *appeal*, but not to *prohibit* them.

And the rule was diſcharged (*b*).

From what time duty to ſeamen ariſes.

3. Lev. 60. 6. Com. Dig. "Temps" (G. 6.).

NOTE, In caſe of ſeamen, the duty does not ariſe from *the contract*, but from *the ſervice* done; and therefore, though the contract be above ſix years, and any part of the ſervice be within that time, it is out of the ſtatute.

And if a man be beyond ſea at the time the debt accrues, he may plead it by way of replication to the defendant's bar of the ſtatute (*c*).

(*a*) Ray. 473. Skin. 59. 2. Show. 232. 2. Ld. Ray. 893. 935. 1. Show. 143.

(*b*) Lord Raymond ſays, this caſe was moved again, but that a prohibition was ſtill denied, "but it ſeemed chiefly "becauſe the defendant had *appealed*;" for that a *prohibition* was granted in Eaſter Term, between *Hide v. Partridge* in the ſame caſe, S. C. 2. Ld. Ray. 937. —See Hide *v.* Partridge, 2. Ld. Ray. 1204. 2. Salk. 424. 3. Salk. 227. 11. Mod. 43.

(*c*) See the 4. & 5. *Anne*, c. 16. ſ. 18, 19, 20.

Anonymous.

Anonymous.

Caſe 32.

PER HOLT, *Chief Juſtice.* If money be deviſed out of lands, ſure the deviſee may have *debt* againſt the owner of the land for the money, upon the ſtatute of 32. *Hen.* 8. c. 1. of Wills; for where-ever a ſtatute enacts anything, or prohibits anything, for the advantage of any * perſon, that perſon ſhall have remedy to recover the advantage given him, or to have ſatisfaction for the injury done him contrary to law by the ſame ſtatute; for it would be a fine thing to make a law by which one has a right, but no remedy but in equity; and the action muſt be againſt the terre-tenant.

Debt lies for money deviſed out of lands.

S. C. 2. Salk. 415. S. C. Holt, 419. 4. Burr. 2381. 3. Com. Dig. "Debt" (A.). Cowp. 291.

Kingſdale *againſt* Mann.

Caſe 33.

POSSESSION was delivered by *habere facias poſſeſſionem* about nine o'clock in the morning, and towards ſix o'clock at night the plaintiff was forcibly turned out of poſſeſſion: and this matter being ſet forth by affidavits,

Execution upon *ba. fa. poſſ.* is not complete till actual poſſeſſion given.

S. C. 1. Salk. 321. Ld. Ray. 252. 346. 482. 718. 2. Brownl. 253. 4. Com. Dig. "Execution" (A. 5.).

THE COURT held,

FIRST, That upon an *habere facias poſſeſſionem* it is not a complete execution until the ſheriff or his bailiffs deliver the poſſeſſion to the party, and are gone away.

SECONDLY, That if, immediately after ſuch execution, the defendant turn him out of poſſeſſion, it would be a diſturbance of the execution, for which *an attachment* ought to go.

A *recent ouſter* after poſſeſſion given is *a contempt.*

S. C. 1. Salk. 321. S. C. Holt, 154. 2. Brownl. 253.

But here they doubted, whether, after ſo many hours diſtance, it could be looked upon as a diſturbance of execution; and therefore the rule was, to ſhew cauſe why *an attachment* ſhould not go.

But if nine hours have intervened the *attachment* ſhall not go in the firſt inſtance. — 1. Keb. 779. 785. 2. Stiles, 318. Strange, 830.

POWELL, *Juſtice*, quoted a caſe in the common pleas, where, upon an entry upon the plaintiff the ſame day he had execution, the Court granted a new *habere facias poſſeſſionem.*

A new *ba. fa. poſſ.* cannot iſſue, if the former be *returned*, though not *filed.* Poſt. 115. 298. Palm. 289. Runn. Eject. 160. 2. Brownl. 216.

To which HOLT, *Chief Juſtice*, anſwered, ſo they might, if the firſt executions were not returned (*a*), otherwiſe not.

Quod CURIA *conceſſit.*

(*a*) Run. Eject. 159.

Case 34.

Longvill *againſt* The Hundred of Thiſtleworth.

In an action of *bue and cry*, if the defendant plead in *abatement* that the robber was taken, and on demurrer a *reſpondeas ouſter* be awarded, the defendant cannot pray *oyer* of the writ, although in the ſame Term; for after a plea in *abatement* there cannot be *oyer* of *the original*.

S. C. 2. Salk. 498.
S. C. Holt, 518.
S. C. 2. Ld. Ray. 969.
Dougl. 215. 477.

THE DEFENDANTS appeared, and took a declaration in *Trinity Term*; and the attornies of both ſides diſcourſing about *the original*, the plaintiff's attorney told the defendant's attorney that the original was filed, but he had a copy of it, whereof he gave the defendant's attorney a copy. The defendant's attorney pleads *in abatement*; and after a *reſpondeas ouſter* awarded by the Court, he gives the plaintiff's attorney a plea, ſetting forth an *oyer* of the original therein.

The queſtion was, Whether the plaintiff ſhould be obliged to receive this plea, all this having been tranſacted in one Term?

WARD *for the plaintiff*. After plea the party can never be intitled to pray *oyer* of the writ. In *dower* you cannot do it after view. Indeed if they had demanded *oyer*, though they had no right to it, and we had granted it to them, they might perhaps take advantage of it (*a*).

* [28]

MOUNTAGUE *contra*. One may have two ſorts of pleas to abate the writ: FIRST, To the action of it: SECONDLY, That though it be well as to the action of it, yet it may be faulty in its frame, for want of legal form or agreeableneſs with THE REGISTER; and therefore, though we firſt plead to the action of the writ, and that be judged againſt us, * why cannot we have *oyer* of the writ, in order to plead to it for a fault in itſelf, or to demur to it? And after a plea in abatement the defendant may demur generally.

Quod CURIA *conceſſit*; for the demurrer then is in chief.

And HE did agree the rule to be, that one ſhould plead but one dilatory; but he inſiſted upon it much, that being in the ſame Term they might crave *oyer* of the writ ſpecially in order to plead in bar or to demur.

And now HOLT, *Chief Juſtice*, *hæſitabat*, for theſe reaſons:

FIRST, He agreed, that after *imparlance* one could not demand *oyer*; for *imparlance* is always unto another Term.

Lane, 59.
2. Lev. 142.

SECONDLY, He agreed, that after plea in *abatement* one could not have *oyer*, even in the ſame Term, to plead another dilatory. But what ſtuck with him was, whether this being in the ſame Term (*b*) they might not crave *oyer* in order to demur to the count, and ſhew a variance between it and the writ, or have it on record before the Court, in order to move it in arreſt of judgment, or to take advantage of it upon *writ of error*, without being put to the charge of a *certiorari*? And he ſaid, that after plea in *abatement* to a bond you may have *oyer*; and if you inſiſt upon it, you muſt enter your prayer of it on record, and they ſhall counterplead or demur to your prayer; that if we give judgment againſt you, you may

2 Lev. 144.
Ld. Ray. 82. 347. 970.

(*a*) As to *oyer* of writs, ſee 7. Mod. 9. 3 Lev. 50. 5. Co. 74. Poſt. 122.—

(*b*) See Rex *v.* Amery, 1. Term Rep. 149.

NOTE *to former edition.*

have

have your *writ of error*; for though granting *oyer* where it ought not to be is no error, yet denying it it is.

LONGVILL *against* THE HUNDRED OF THISTLEWORTH.

DARNELL quoted the case of *London v. Bury*, where the plaintiff was forced to counterplead the *oyer*.

But at another day, PER TOTAM CURIAM, there shall be no *oyer* after a plea *in abatement*; for the true reason of *oyer* is, that the defendant may *demur*, and shew some cause, as a variance between it and THE REGISTER, &c.; and that amounts to a plea in *abatement*, or to plead some matter in abatement. See *Co. Ent.* 320. That after plea in *abatement* over-ruled (*a*) the defendant has no more to do with the original.

Vide 1. Salk. 7. and post. 225. Tidd's Pract. 223. 239.

And as to what occurred to THE CHIEF JUSTICE, that it might furnish matter in arrest of judgment, THE COURT all agreed now, that such motions are not acts of record, but are in nature of informations to the Court, as from *amici Curiæ*, to prevent erroneous judgments.

POWELL, *Justice*, in this case said, that formerly all demands of *oyer* were in court, as it is now in case of appeal; but that now it is demanded and granted between the attornies, and where there ought to be *oyer*, one is not bound to plead without it: and if one attorney in time demands *oyer* of the other, and he tells him the writ is filed, and that he may take it, it is well; but sure he cannot without such consent enter a demand, and a giving of *oyer*; for if attornies be admitted so to do, they will set forth the matter falsely; which though it could not ensnare the other side, because they may produce the right writ, &c. and have it entered, yet it would be very tedious and inconvenient: as if a deed be pleaded, it remains in court all that Term, yet one cannot go to the officer and take *oyer* of it without leave of Court, or of the attorney; and the very form of pleading shews that it must be upon demand; and *oyer* of a writ is in order to object to it; and after you have pleaded your dilatory * without *oyer*, to what purpose should you have it now: it cannot be to plead it *in bar*; and to plead *a dilatory* it cannot be, because that would be to let you plead *a dilatory* after *a dilatory*; and to assign *a variance* between *the writ* and *the count* would be a *dilatory*.

* [29]

So, PER TOTAM CURIAM, they were denied the *oyer*.

(*a*) That a plea to a bond for *misnomer* must be before *oyer*, for by *oyer* you admit the name, *Vide* Hob. 162.—NOTE to *former edition*.

Anonymous. Case 35.

PER CURIAM. It has been settled here on debate, that money ought not to be brought into court to have it struck out of the declaration, where an executor is plaintiff; but you may plead a *tender*, and *touts temps prist*.

Where an *executor* is plaintiff, money ought not to be brought into court, &c.

Ante, 11. 25, &c. 2. Salk. 583. 596, 597.

Caſe 36.

Buller *againſt* Crips.

Before the paſſing of the ſtatute 3. & 4. *Anne*, c. 9. a *promiſſory note* was not aſſignable or indorſable over within the cuſtom of merchants.

A NOTE was in this form: "I PROMISE to pay *John Smith*, "or order, the ſum of one hundred pounds, on account of "wine had from him." *John Smith* indorſes this note to another; the indorſee brings an action againſt him that drew this *note*, and declares upon the *cuſtom of merchants* as upon *a bill of exchange*.

A motion was made in arreſt of judgment upon the authority of the caſe of *Martin v. Clarke*.

S. C. 1. Salk. 130. Holt, 119. 2. Ld. Ray. 757.

But BROTHERICK would diſtinguiſh this caſe from that; for there the party to whom the note was originally made brought the action, but here it is by the indorſee; and he that gave this note did, by the tenor thereof, make it aſſignable or negotiable by the words "or order," which amount to a promiſe or undertaking to pay it to any whom he ſhould appoint, and the indorſement is an appointment to the plaintiff.

HOLT, *Chief Juſtice*. I remember when actions upon inland bills of exchange did firſt begin (*a*); and there they laid a particular cuſtom between *London* and *Briſtol*; and it was an action againſt the acceptor; the defendant's Counſel would put them to prove the cuſtom; at which HALE, *Chief Juſtice*, who tried it, laughed, and ſaid, they had a hopeful caſe of it. And in my LORD NORTH's time it was ſaid, that the cuſtom in that caſe was part of the common law of *England*; and theſe actions ſince became frequent, as the trade of the nation did increaſe; and all the difference between *foreign bills* and *inland bills* is (*b*), that *foreign bills* muſt be proteſted before a public notary before the drawer can be charged, but *inland bills* need no proteſt: and the notes in queſtion are only an invention of THE GOLDSMITHS in *Lombard-Street*, who had a mind to make a law to bind all thoſe that did deal with them; and ſure to allow ſuch a note to carry any lien with it were to turn a piece of paper, which is in law but evidence of a parol contract, into a ſpecialty: and beſides, it would impower one to aſſign that to another which he could not have himſelf; for ſince he to whom this note was made could not have this action, how can his aſſignee have it? And theſe *notes* are not in the nature of *bills of exchange* (*c*); for the reaſon of the cuſtom of *bills of exchange* is for the expedition of trade, and its ſafety; and likewiſe it hinders the exportation of money out of the realm. He ſaid, if the indorſee * had brought this action againſt the indorſor it might peradventure lie (*d*); for the indorſement may be ſaid to be tantamount to the drawing of a new bill for ſo much as the note is for upon the perſon that gave the note; or he may ſue the firſt drawer in the name of the indorſor, and convert the money when recovered to his own uſe; for the indorſement

* [30]

(*a*) See 5. Mod. 13.
(*b*) Poſt. 81.
(*c*) 1. Salk. 24. 129. 2. Salk. 442.
(*d*) What actions lie on bills of exchange, and how brought, and againſt whom—ſee Hard. 487. 1. Mod. 285. 1. Lev. 298. 2. Keb. 334. 695. 2. Vent. 307. 1. Keb. 592. 636. 1. Vent. 45. 152. 1. Salk. 24. 124. 133. 7. Mod. 45. 152.—NOTE *to former edition*.

amounts

amounts at leaſt to an agreement that the indorſee ſhould ſue for money in the name of the indorſor (*a*), and receive it to his own uſe; and beſides, it is a good authority to the original drawer to pay the money to the indorſee.

And POWELL, *Juſtice*, cited one caſe, where a plaintiff had judgment upon a declaration of this kind in the common pleas; and that my LORD TREBY was very earneſt for it, as a mighty conveniency for trade; but that when they had conſidered well the reaſons why it was doubted here, they began to doubt too.

THE WHOLE COURT ſeemed clear for ſtaying judgment.

At another day HOLT, *Chief Juſtice*, declared, that he had deſired to ſpeak with two of the moſt famous merchants in *London*, to be informed of the mighty ill conſequences that it was pretended would enſue by obſtructing this courſe; and that they had told him, it was very frequent with them to make ſuch *notes*, and that they looked upon them as *bills of exchange*, and that they had been uſed for a matter of thirty years, and that not only *notes*, but *bonds* for money, were transferred frequently, and indorſed as *bills of exchange*. Indeed, I agree *a bill of exchange* may be made between two perſons without a third; and if there be ſuch a neceſſity of dealing that way, why do not dealers uſe that way which is legal? and may be this: as, if *A.* has money to lodge in *B.*'s hands, and would have a negotiable *note* for it, it is only ſaying thus: "*Mr. B.* pay "me, or order, ſo much money value to yourſelf;" and ſigning this, and *B.* accepting it: or he may take the common note, and ſay thus; "For value to yourſelf pay me (or indorſe) ſo much;" and good.

And THE COURT at laſt took the Vacation to conſider of it (*b*).

(*a*) Bromwich *v.* Lade.—*Vide* Noy, 178. 3. Lev. 299. 3. Mod. 86.—NOTE *to former edition.*

(*b*) Now by 3. & 4. *Anne*, c. 9. "All "notes in writing made and ſigned by "any perſon or perſons, whereby ſuch "perſon or perſons ſhall promiſe to pay "to any other perſon, his, her, or their "order, or to bearer, any ſum of money "mentioned in ſuch note, ſhall be taken "and conſtrued to be, by virtue thereof, "due and payable to any ſuch perſon or "perſons to whom the ſame is made "payable; AND ALSO, every ſuch note "ſhall be aſſignable or indorſable over in "the ſame manner as inland bills of ex-"change, and the perſon or perſons to "whom ſuch ſum is by ſuch note made "payable, may maintain an action for the "ſame, in the ſame manner as they "might do on an inland bill of exchange "made or drawn according to the cuſtom "of merchants, againſt the perſon or "perſons who ſigned the ſame; and any "perſon or perſons to whom ſuch note "is indorſed or aſſigned, or the money "therein mentioned ordered to be paid "by indorſement thereon, may maintain "an action for ſuch ſum of money, "either againſt the perſon or perſons "who ſigned ſuch note, or againſt any of "the perſons who indorſed the ſame, in "like manner as in caſes of inland bills of "exchange." See Brown *v.* Harraden, 4. Term Rep. 148.

Caſe 37.

The Queen *againſt* Tracy.

On an indictment for falſely arreſting a man by a certain warrant, and thereby extorting divers ſums of money, knowing the ſaid warrant to be *forged* —*Quære*, Whether the forgery be matter of *deſcription*, or of *aggravation* only.

TRACY, a juſtice of the peace for *Middleſex*, was indicted, for that he, together with *Taylor* and *Jeoffries*, by pretence of a certain warrant in writing, ſuppoſed to be ſigned and ſealed by *Sir Simon Lovell*, recorder of *London*, did arreſt *J. Muriel*, and brought him before *J. Chamberlain*, a juſtice of peace for *Middleſex*, although the warrant was not directed to any of them, and although it was forged and counterfeited to *Tracy*'s knowledge; and that *Tracy*, when *Muriel* was before the juſtice of peace, perſuaded him to refuſe bail him, though the fault being a miſdemeanor was in its nature bailable; and that when *J. Muriel* was committed by the juſtice, *Tracy* and the other two, at the perſuaſions and inſtance of *Tracy*, extorted divers ſums of money from him.

S. C. poſt. 114. 169. 178. S. C. 3. Salk. 192. S. C. Holt, 706. Poſt. 90. 7. Mod. 99.

The jury acquitted the defendant of *the forgery*, and of knowing that the warrant was forged, and found him guilty of all the reſt.

WELLD and PARKER now moved in arreſt of judgment,

* [31]

* FIRST, That the verdict was contradictory, for it acquitted him of that which was the foundation of all that whereof he is found guilty; for the charge is, that he did ſo and ſo by virtue of a certain forged warrant; and if the warrant be not forged, the reſt either is no crime, or rather it is another offence than what the defendant is charged with; for to get one taken up upon a real warrant not directed to him, and to do whatever is charged here thereupon is another offence than is deſcribed here: therefore defendant is *acquitted* of the offence wherewith he is charged, and *found guilty* of another.

And upon the firſt objection, a caſe of an indictment againſt THE PLAYERS *of Drury-Lane* was cited; where the indictment was for building a ſcandalous houſe for the acting of profane and lewd plays, and that they acted ſuch plays; and though they could prove the acting of immoral plays, yet, becauſe they could not prove the building, the defendants were acquitted.

1. Vent. 12. 234. 362. Ray. 118. 176. Hob. 205. 266. 2. Keb. 473. 476.

TO THIS *it was anſwered*, that though the indictment did not alledge the warrant to have been forged, but only under a *licet* by way of aggravation, and not by way of deſcription, and though the warrant be not forged, yet the facts charged upon the defendants are criminal; as to perſuade one by wicked and falſe inſinuations to refuſe bail, to have cruelly uſed him in gaol, and by dureſs to extort money of him.

An indictment for procuring a juſtice to refuſe bail muſt ſtate, that bail was *offered* and refuſed.

SECONDLY, That it was laid, that he prevailed with the juſtice of peace to refuſe bail, and it was not laid that any bail was offered.

TO THIS OBJECTION *it was anſwered*, that it was not ſaid that bail was offered; it was ſaid, every refuſal muſt be of an offer; and refuſal could not poſſibly be without an offer.

THIRDLY,

THIRDLY, It is not directly ſaid, that the juſtice did commit him, but only, that when he did commit him, *Tracy* did ſo and ſo to him; and it may be he never was committed, for aught that appears here.

An indictment for procuring a perſon to be falſely committed muſt ſtate that he was actually committed.

TO THIS OBJECTION *it was anſwered*, that the commitment was not charged as a crime, but only as an inducement to the extortion, which is directly charged; and what comes under an inducement need not that preciſeneſs.

FOURTHLY, They ought to ſhew the certainty of the ſums taken, and for what they were taken, otherwiſe the defendant may not know what anſwer to make.

An indictment for *extortion* muſt ſtate *the ſums* taken.

FIFTHLY, As to ſome part of the charge, they charge him as acceſſary, when, it being treſpaſs, they all are principals, and ought to be charged as ſuch.

An indictment for *treſpaſs* is good, although ſome of the facts charge the priſoner as an acceſſary.

HOLT, *Chief Juſtice.*

As to THE FIRST OBJECTION the queſtion is, Whether the *forgery* be the ground-work, or whether it be an unneceſſary addition put in only for aggravation? for if it be matter of deſcription, the objection is of weight.

* As to THE SECOND OBJECTION, that no bail were offered; it is true, a juſtice of peace is not bound to aſk for bail if they be not offered to him, and therefore the objection ſeems of weight. And ſomething has been offered that a verdict would influence the caſe; but it does not, for in criminal matters the jury is only charged to enquire of matters as they are alledged. *[32]

As to THE THIRD OBJECTION, that he could not procure if it were not actually done; that is true, but that is but argumentative; and indictments ought to be poſitive and direct.

1. Vent. 19. 4. Co. 41. 48. 9. Co. 66. Noy, 41. 32. Plow. 85, 86. 1. Ro. Ab. 79, 80.

As to THE FOURTH OBJECTION to the execution, the crime does not conſiſt in the *quantum* of the money extorted, but in taking any at all.

AS TO THE FIFTH OBJECTION, that he is not in ſome things charged as principal. It is to be known, that a fact which would make one *acceſſary* in *felony*, in *treaſon*, and in *treſpaſs*, makes him *a principal*; and ſure one may lay the matter either way, *viz.* making him principal or laying it ſpecial, as it will appear upon evidence. In treaſon all are principals; and if upon the ſtatute of 25. *Edw.* 3. c. 2. one conſpires the death of the queen, and is committed to priſon for the ſame, and one procures him to eſcape, or harbours him after ſuch time as he knows him charged with treaſon, or to have committed treaſon, you may indict him upon the ſpecial matter, that *A.* committed treaſon, that *B.* knew of it and received him; and yet this is not one of the treaſons mentioned by that ſtatute, but it is ſo by neceſſary conſequence of law. As if a thing be made felony, all acceſſaries before and after are felons in conſequence;

3. Wms. 475. 439. 485.

THE QUEEN *against* TRACY.

quence; and if an offence which is felony be made treaſon, they that would have been acceſſaries before ſhall now be principals.

POWELL, *Juſtice.* Sure the fact might be laid ſpecially in *treſpaſs*; for indictments need not be like other pleadings, according to the conſtruction of law upon the matter; and ſo it may be in caſe of *treaſon*; it was the caſe of *Abingdon v. Gardner* in the GUNPOWDER PLOT. In ancient indictments of murder upon malice in law, the malice in law uſed to be ſpecially laid; but ſince it has been agreed, that it may be generally *ex malitiâ*: and I think, in the principal caſe, it is more prudent and ſafe to draw the indictment upon the ſpecial matter; for otherwiſe it might be difficult to perſuade *the lay gents*, that procuring, inciting, commanding, &c. would make one a principal.—As to the firſt two exceptions, he agreed with THE CHIEF JUSTICE; but he doubted whether, if an indictment charge one to have procured a crime to be done, it need be directly alledged that it was done: as if the indictment be for maliciouſly procuring one to be indicted of felony, whether it need be directly averred that he was indicted, becauſe the word "*procuravit*" neceſſarily ſeems to import it, and not only that he procured *ad faciend.* as you would have it, that is, to conſent and agree to do it. As to the uncertainty of the ſums extorted, an indictment for engroſſing *magnam quantitatem frumenti* was held good. And where you inſiſt, that the warrant being true and real the arreſt was lawful, and that *falſò et malitioſè* are only pepper and vinegar, which will not determine any act to an ill ſenſe; * [33] * ſure it is hard to maintain that *falſo et malitioſè* are only pepper and vinegar, for thoſe words diſcover the evil root from which the fact ſprung.

Carthew, 113. 216. 4 382. 403, 404.

1. Vent. 12. 18. 83. 25.

HOLT, *Chief Juſtice*, ſaid, that *ex malitiâ præcogitatâ* in an indictment for killing a man was ſuch ſauce as would cut his throat; and though it be admitted that the warrant being true the arreſt was lawful, yet that the arreſting a man upon a true warrant, and procuring the refuſal of bail when tendered, as the fact appeared, and following the party into gaol, and extorting money from him there by dureſs and threats of iron, was ſuch a complicated offence as deſerved an indictment, and that the ſubſequent *tort* made the original act illegal, as being an abuſe of legal proceſs.

4. Com. Dig. tit. Indictment (G. 3.). Ante, 32.

And at another day, HOLT, *Chief Juſtice*, declared, that they were all of opinion, that they could not give judgment upon the indictment; that it was too uncertain, and one complicated offence; that it did not appear by it that any bail had been offered, or what ſum, or that any certain ſum was extorted.

But they only gave judgment to *quaſh the indictment*, and not *for the defendant*, whom they ordered to enter into a new recognizance to appear to a new indictment.

Wiat,

Wiat, *Qui Tam*, *againſt* Ayland. Caſe 38.

IT was a declaration of *Michaelmas Term* generally, which *primâ facie* is to be intended to be of the firſt day of the Term, and the fact was laid to be on the fifteenth of *November* after, ſo the action brought, of their own ſhewing, before cauſe.

In what caſe a miſtake in the MEMORANDUM may be *amended*.

S. C. 1. Salk. 324. S. C. Holt, 209. Poſt. 129. 2. Salk. 682. 2. Saund. 689. 1. Vent. 135. 2. Lev. 13. 176. Hob. 73. Ld. Ray. 897. Fitzg. 193. Stra. 806. 1023. 1271.

PER CURIAM. If upon examination it appear, that the declaration was after the fifteenth, it ſhall be ſet right; as if the bail was filed after the fifteenth, or the *bill of Middleſex* taken out.

And ſo it was referred to THE MASTER to examine.

THEY ALL AGREED it could not be amended by any *ſtatute of Jeofail*; but if bail were filed after the fifteenth of *November*, that would be a good warrant for A MEMORANDUM of the day that the declaration was of, for none is *in cuſtodiâ mareſchalli* till bail filed.

NOTE, At laſt the parties agreed to waive execution, and go to trial again.

The Queen *againſt* Bothell. Caſe 39.

FIRST, If one bring a *certiorari* to remove an indictment, and do not give bail to try it according to the ſtatute, it is no *ſuperſedeas*.

A *certiorari* is no *ſuperſedeas*, if there be no recognizance.

S. C. 1. Salk. 149. S. C. Sett. & Rem. 220. S. C. Holt, 157. Poſt. 43. 1. Salk. 144. Skin. 419. Ld. Ray. 722. 12. Mod. 646.

SECONDLY, A record once filed in this court is never ſent back: though BROTHERICK at the bar ſaid, it might be ſent back the ſame Term.

A record once filed cannot be remanded after the Term.

Poſt. 40. 43. 61. 83.

Squire *againſt* Grevell. Caſe 40.

ERROR of a judgment in the court of common pleas in debt upon a bond for performance of an award. After *no award* pleaded, the plaintiff ſet forth *an award* on ſuch a day, reciting ſeveral ſuits depending between the parties in the common pleas, and a ſubmiſſion of all matters pending.—The arbitrators award, FIRST, That all ſuits between the parties ſhall ceaſe. SECONDLY, That the defendant ſhall pay to the * plaintiff ten pounds in full of all demands, and alſo give him a releaſe from the beginning of the world to the time of the award made. THIRDLY, That upon receipt of the ten pounds the plaintiff ſhould make a releaſe to the defendant from the beginning of the world to the time of the award.

An award that "all ſuits ſhall "ceaſe," is final.

S. C. Holt, 81. S. C. 2. Ld. Ray. 961. S. C. 1. Salk. 74. Poſt. 232. Kyd, 142. 2. Stra. 1024. 1. Com. Dig. "Arbitrament" (C. 17.).

PARKER took three exceptions to this award:

FIRST, It is not *final*, for it is only that "all ſuits now depend-"ing ſhall ceaſe," that is to ſay, ſhall not go on, which is no more than

SQUIRE *againſt* GREVELL.

than that the party ſhall be nonſuited, which is not final, and therefore not good. It is true, no new ſuit can be brought while theſe pend, becauſe theſe may be pleaded in abatement; nor can theſe be proſecuted becauſe of the award; but if either of the parties die, new ſuits may be proſecuted for the ſaid cauſes, notwithſtanding this award.

An award that one of the parties ſhall pay 10l. and that the other, on receipt thereof, ſhall make a *releaſe*, is good.

SECONDLY, The awarding a *general releaſe* would indeed make it a good award, if it were concluſive, but it is left in the plaintiff's election whether he makes any or not; for the releaſe is ordered to be made upon receipt of the ten pounds, and it is not awarded that he ſhall receive it, and if he refuſe he is not bound to releaſe.

1. Roll. Abr. 255. Kyd, 156. 1. Com. Dig. "Arbitrament" (E. 14.).

An award of a releaſe to the time of the award made is good.

2. Keb. 431. 3. Keb. 253. 666. 10. Mod. 201. 3. Ld Ray. 964. 1. Ld. Ray. 116. 12. Mod. 116. 589. Kyd on Aw. 165. 181.

THIRDLY, The releaſe is ordered to be until the time of the award. But he confeſſed he did not much inſiſt upon that. The authorities were againſt him for a double reaſon: FIRST, That no cauſe of action ſhall be intended to have ariſen between the time of the ſubmiſſion and the award, if it be not ſhewn. SECONDLY, That a releaſe to the time of the ſubmiſſion is a good releaſe in purſuance of the award, and the latter he ſaid he took to be the better reaſon; for a man might have a cauſe of action accrue to him between the ſubmiſſion and the award and not know of it; and it would be hard to put him under a neceſſity of releaſing it; and the reaſon why a releaſe to time of ſubmiſſion is held good is, not becauſe it ſhall be intended to be the meaning of the arbitrators that it ſhould be ſo, but it is rather a controlling of their meaning as far as it is void by conſtruction of law.

PENGELLY *contra*. The awarding that "all ſuits ſhall ceaſe" is, that they ſhall for ever ceaſe, and it extinguiſhes the duty; for if the words had been that "all actions ſhall ceaſe," the duty had been gone; for if the remedy be gone the right is gone; and the word "ſuit" is of a larger extent and ſenſe than "action;" for by "releaſe of ſuits" one may bar himſelf of execution, which he cannot do by "releaſe of action (*a*). Such award extinguiſhes the duty (*b*). An award was, that one of the parties ſhould pay to the other ſo much money on ſuch a day, and that all ſuits ſhould ceaſe till failure of payment, and it was held good (*c*). Beſides, this ſum being awarded "in full of all demands," and the ſubmiſſion being with an "*ita quod* an award be made of the premiſes," it is in itſelf final (*d*).

*[35]

* HOLT, *Chief Juſtice*. As to the releaſe you ſay, that it is put upon the party's own act, in receiving or refuſing the money, to releaſe or not; but it has been held, in the caſe of *London v.*

(*a*) 1. Roll. Abr. 261. pl. 7.

(*b*) See the caſe of Strangford *v.* Green, Eaſter Term, 29. *Car.* 2. and Ball *v.* Heſcott, 11. *Will.* 3.

(*c*) 1. Lev. 58.

(*d*) Allen, 26. 85. 1. Roll. Abr. 260. pl. 55. 258. 1. Sid. 154. 1. Lev. 132. Hob. 190. Stiles, 27. Cro. Eliz. 448. 851.

Craven,

SQUIRE *againſt* GREVELL.

Craven, in the latter end of *Style* (*a*), that where a thing is agreed to be done upon payment and receipt, a tender of the payment and refuſal intitles the party to it as much as an actual payment; and the authorities have been ſo ever ſince. *Quære* 9. *Co.* 79. *Dyer*, 356. 1. *Lut.* 224. 227. 238. *Lev. Ent.* 30. 2. *Sand.* 96.

Then as to THE NEXT POINT, "That all ſuits pending between "the parties ſhall ceaſe:" The queſtion is, Whether this goes to the cauſe of action? If a man releaſe his action, and has no other remedy for his right but an action, Does not that diſcharge the right of the thing? Now here is an action depending; if a man releaſe that action, he thereby releaſes the right of action; and by the ſame reaſon determining the ſuit determines the right of the thing, becauſe there is no remedy but by ſuit; then this award is final. If in treſpaſs the plaintiff after the laſt continuance releaſe the action, the right is gone; and if a releaſe will do it, why not an award? Indeed if the party had two remedies, one by action and another by entry, and he releaſed the action, he might notwithſtanding enter.

Co. Lit. 289. 2. Ro. Abr. 404. 1. Danv. 1. Cro. El. 14. 161.

And as for the releaſe to the time of the award made, it ſhall not be underſtood that there was any cauſe of action meant, if it be not ſhewn; and if there be, the party may ſhew it, and ſay that he tendered a releaſe to the time of the ſubmiſſion.

POWELL, *Juſtice*. I think all the three points are final, or if but one of them is ſo, the award will be good for ſo much, if that does not depend upon another branch of the award which is ill; and if there were any ſuits pending, the awarding that they ſhall ceaſe is, that they ſhall be at an end for ever; and the words "*now de-*"*pending*" was only to ſhew what ſort of actions they made their award of. And the ten pounds being awarded to be paid "in full "of all demands," that ſhall be intended in full of all demands to the time of ſubmiſſion, and not to the time of payment (*b*). And if money be awarded to be paid, and that the other upon receipt ſhall make releaſe, that I take to be an award to receive; and for this he quoted a caſe in the common pleas in his time, and 1. *Rol. Ab.* 254, 255. *pl.* 16.

2. Cro. 354. 1. Salk. 74. 72. Style, 44. Hob. 49. 8. Co. 97.

HOLT, *Chief Juſtice*.—Here the very awarding a ſum of money is a bar of actions; for by the awarding of money to him a duty thereby ariſes and veſts in him, which is a good bar wherever "accord with ſatisfaction" is a good plea; but anciently it was held, that if the thing awarded be not money, but the doing of ſome collateral act, the party to whom it is awarded is without remedy, and therefore ſuch award would be void. But the contrary has been held ſince; for if two men ſubmit to the award of a third perſon, they two do alſo thereby promiſe expreſsly to abide by his determination (*c*), for agreeing to refer is a promiſe in itſelf; but

(*a*) Stiles, 388. 481.
(*b*) See Kyd on Awards, 158.
(*c*) Kyd on Awards, 7.

here

SQUIRE *againſt* GRAVELL.

here a ſum of money is ordered to be paid; it is immediately a duty; and if there were no more than an award to pay a ſum of * money in ſatisfaction of all demands, it would be final.

And, by THE WHOLE COURT, the judgment was affirmed.

Caſe 42.

Ward *againſt* Evans.

If the *holder* of a bill of exchange for *ſixty pounds* ſend his ſervant with it to the *payee* for payment, and the *payee* give the ſervant a *draft* on his *banker* for a *hundred pounds*, and the *banker* writes off the *ſixty pounds* from the *hundred pounds* draft, but the *ſervant*, inſtead of receiving *the money*, takes a *note* of *ſixty pounds* from the *banker* on a *merchant*, who immediately after becomes inſolvent, and refuſes to pay the note, the act of the *ſervant* ſhall not, in ſuch caſe, bind his *maſter*; for the ſervant was ſent to receive *the money* from *the payee*, and not *the note* from *the banker*; and therefore the *maſter* may recover the *ſixty pounds* from *the banker* in an action of *aſſumpſit*, as money had and received from the *payee* of the bill to his uſe.

A CASE made before HOLT, *Chief Juſtice*, at *Guildhall*, was this:

One *Fellowes* owed the plaintiff *ſixty pounds* by bill of exchange. *Sir Stephen Evans* the defendant owed *Fellowes* a *hundred pounds* alſo by bill. The plaintiff ſends his man to *Fellowes* with the bill for payment. *Fellowes* ſends his man with the plaintiff's man to *Sir Stephen Evans* with the note of a *hundred pounds* to pay the plaintiff his bill. *Sir Stephen Evans* writes off *ſixty pounds* of the *hundred pound* note, and indorſes it upon the back, and gives the plaintiff's ſervant a bill of *ſixty pounds and ten ſhillings* upon another perſon for his *ſixty pounds*, taking *ten ſhillings* from the plaintiff's ſervant, who the very next day carries the bill for payment to the party, who had juſt failed immediately before.

The queſtion was, Whether this were a good payment by *Evans* to the plaintiff?

DARNELL, *Serjeant*. There are three things to be conſidered here.

FIRST, How far the tranſaction of a ſervant as to receipts and payments ſhall bind his maſter?

SECONDLY, What amounts to a payment? Whether ſuch a note as was given here is good payment to the maſter himſelf?

THIRDLY, Whether, though this tranſaction of the ſervant ſhould not bind the maſter generally, it will be binding between goldſmiths, as this caſe is?

AS TO THE FIRST he ſaid, that upon this head of a ſervant binding his maſter by his act, there might be a reaſonable difference between the ſervants of merchants and thoſe of other men; for probably ſervants may affect their maſters being merchants, &c. in point of charge and diſcharge; but that firſt muſt be in matters purely concerning their trade and way of dealing, as to anſwer bills of exchange, and letters of advice concerning goods, or ſuch like, which require diſpatch; but he cannot accept a bill of exchange, without plain evidence that he has authority to do it. So is *Lex Mercat.* 265. which is an excellent book concerning theſe matters. And it is good evidence in that caſe, that the maſter

S. C. 2. Ld. Ray. 928. S. C. Com. 138. S. C. 2. Salk. 442. S. C. 3. Salk. 118. S. C. 12. Mod. 521. S. C. Holt, 120. Winch, 24, 25. 3. Mod. 86. 3. Lev. 299. Moll. l. 2, c. 10. ſ. 19. 27. 29. 5. Mod. 398. 3. Bac. Abr. 562. 1. Stra. 415. 3. Burr. 1516. 1. Bl. Rep. 485. 2. Wilſ. 353.

allowed

allowed the payment or proteſting of bills drawn by him, or gave him ſuch authority; for it is hard to put it in the power of a ſervant to ruin his maſter without his order or knowledge. It was never heard, that if a merchant ſend his ſervant to receive *money*, that he may receive *a bill* for it; and without doubt it would be void if done by any other ſervant of a private perſon, becauſe beyond his authority, which ought to be purſued ſtrictly. WARR *againſt* EVANS.

SECONDLY, Whether ſuch a bill be payment at all? The law takes no notice of any payment to diſcharge a debt but ready money, or ſomething elſe given and taken in ſatisfaction (*a*). A leſs ſum is no payment for a greater, if not before it is due, or at another place than it is payable at. *Mar. fo.* 25. Ld. Ray. 442. Stra. 480. 505. 653. 955. 1248.

* THIRDLY, It being the caſe of goldſmiths does not alter the caſe, for the delivery of theſe notes, as is now uſed, is no part of their trade; a very new invention, already obnoxious to ſuch practices as deſerve no encouragement. * [37] 2. Salk. 442.

He agreed, that in ſome caſes ſuch notes may be given for abſolute payment; as if one come to buy goods of another, and, having agreed on a price, the buyer, upon delivery of goods, give the ſeller a *goldſmith's note* in ſatisfaction, this ſhall be looked upon as payment *primâ facie*, becauſe, being all at one time, it ſhall lie upon the ſeller to prove that it was a conditional payment, and ſo expreſſed at that time; but here it lies upon the giver to prove that he gave it in ſatisfaction. The party's not going immediately to call for it is evidence that it was taken in ſatisfaction; but he went the next morning.

HOLT, *Chief Juſtice*. It is plain, that the ſervant was ſent by his maſter to receive *the money*, and not *the bill*. Next, it is alſo plain, that if the ſervant, upon tender of the bill, had come back to the maſter to know his mind, and the maſter had ſent him back for the money, and notwithſtanding he had taken the bill, that would not have charged the maſter (*b*); but here was ſome time for the maſter to aſſent to what his ſervant had done; but giving ſuch a bill as this upon an original contract, is evidence that it was given and received for payment: AND HE HELD CLEARLY, that the indorſement by *Evans* on the note of *Fellowes* was a receipt by him of ſo much money to the uſe of plaintiff, for which an *indebitatus aſſumpſit* would lie; and in this point they all clearly agreed without doubt. Hob. 154. Moll. l. 2. c. 10. ſ. 17. 1. Salk. 132, 133.

And, at laſt, THEY ALL AGREED, That if a maſter ſend his ſervant to receive money upon a *goldſmith's bill*, or any other, and he take another bill upon another perſon for payment, that ſhall not bind the maſter without ſome ſubſequent act of conſent, as if he do not ſend the bill back in reaſonable time, with regard to circumſtances, &c.

(*a*) See 3. & 4. *Anne*, c. 9. ſ. 7. *v.* Smith, Eaſter Term, 5. *Anne*, in
(*b*) See the caſe of Sir Charles Thorold B. R. 10. Mod. 71. 87. Holt, 462.

And

WARD *againſt* EVANS.

And HOLT, *Chief Juſtice*, deſired the Counſel, if they were not ſatisfied with the opinion of the Court, to have their *bill of exception*, and that he would ſign and ſeal it, that they might have a writ of error, which they declined (*a*).

(*a*) And by THE WHOLE COURT, judgment was given for the plaintiff. S. C. 2. Ld. Ray. 931. S. C. 1. Comy. Rep. 138.

Caſe 42.

Anonymous.

If one of two coroners be inſolvent, and ſuffer an eſcape, yet the other ſhall not be charged.

3. Lev. 399. 2. Mod. 23, 24. Show. 400.

PER HOLT, *Chief Juſtice*. If there be two coroners, one whereof being a beggar ſuffer an eſcape, it is very hard to charge the other with it. The caſe came before me once, and I would not take upon myſelf to determine it, though my brother LEVINZ reports that I would have over-ruled him in the exception (*a*). And that caſe has been argued ſeveral times in the common pleas, but not adjudged: But THE COURT thought it hard to charge the other. See the caſe of *Butcher v. Porter* (*b*), in the time of the late king.

(*a*) Taylor *v.* Clerke, 3. Lev. 399. (*b*) Carth. 243. 1. Show. 400. 2. Ld. Ray. 1017.

*[38]

Caſe 43.

* Godolphin and his Wife *againſt* Tudor.

Leave to plead *to iſſue* after *demurrer* joined.

S. C. poſt. 234. S. C. 2. Salk. 468. S. C. 3. Salk. 251. 2. Sal. 515. Poſt 84. 88. 118. Ld. Ray. 669. 679. 856. 1. Barnes, 110. 212. 2. Barnes, 134. 5. Com. Dig. "Pleader" (C. 6.).

A DEMURRER was joined in *Eaſter Term* laſt, and all continuing *in paper*.

They moved now to change their plea, and plead a matter iſſuable.

PER CURIAM. It is very regular while it is in paper to change or amend upon payment of coſts.

And motion was granted upon payment of coſts.

Caſe 44.

Lord Harry Scot *againſt* Brace, Redmond, and Others.

Bail in error upon bond with a penalty. 5. Com. Dig. "Pleader" 709, 710.

A BOND was for the ſafe return of ſuch a ſhip (ſuppoſe under a hundred pounds penalty) and judgment thereupon in the common pleas, and writ of error here.

The queſtion was, Whether there ſhould be bail within the ſtatute?

And PER CURIAM, Let there be bail *niſi* (*a*).

(*a*) See Putt *v.* Coney, Stra. 476.

Caſe 45.

Monkton *againſt* Aſhly and Others.

Treſpaſs for breaking his cloſe, and hunting and killing his rabbits, may be laid with a *continuando*.

TRESPASS for breaking plaintiff's cloſe, treading his graſs, hunting and killing his rabbits, with a *continuando* of the ſaid treſpaſs, as to all the particulars *diverſis diebus et vicibus*, from

—S. C. 2. Salk. 638. S. C. Holt, 697. S. C. 2. Ld. Ray. 974. 2. Roll. Abr. 549. Skinner, 42. 641. Carthew, 230. 2. Mod. 253. 5. Mod. 178. 1. Lev. 210. 3. Lev. 93. 2. Ld. Ray. 936. Cowp. 828. 5. Com. Dig. "Pleader" (3. M. 10.).

from ſuch a time to ſuch a time. After verdict and entire damages,

MONKTON *againſt* ASHLY AND OTHERS.

SALKELD moved in arreſt of judgment, That of their own ſhewing they had recovered damages for that for which they ought not to have recovered; for every entry, hunting, and killing, is a new treſpaſs (*a*). A defendant came every day upon the plaintiff's ground to claim it as his own; and it was held that he could not be declared againſt with a *continuando* (*b*). Nothing properly can be laid in *continuance* but acts of duration in themſelves, as nuiſance, ſtopping of lights, water, feeding of cattle; for theſe are permanent things, and have duration without intermiſſion, and therefore may be laid with *a continuando*. And other things can by no means be continued, as killing a man's horſe, cutting a tree; for there the treſpaſs terminates with the very act, and cannot be repeated. So the queſtion will be then of acts that may be repeated, and in what caſes they may be alledged with *a continuando?* If the firſt entry is ſuppoſed to be without an *ouſter*, the ſecond entry will be ſuch a new treſpaſs as cannot be called *a continuando* of the firſt; and a releaſe of the firſt will not diſcharge it; but if the firſt act amount to an *ouſter*, all ſubſequent acts are continuances of it (*c*); and he ſaid, without this diſtinction, the books were not reconcileable. In *Fitzherbert* (*d*), treſpaſs for breaking his cloſe, and cutting his graſs with *a continuando*, muſt be underſtood of an actual *ouſter*, 20. *Hen.* 7. *pl.* 3. and *Butler v. Hedges* (*e*), which he ſaid was a wonderful ſtrong caſe, and contrary to the caſe of *Brook v. Biſhop* (*f*).

* MONTAGUE, *for the plaintiff.* As to the objection, either it is poſſible or it is not; if poſſible, damages may well be for it; if impoſſible, the Court will intend the damages to have been given altogether for that which is poſſible, and not for that which is impoſſible. * [39]

SALKELD, *for the defendant.* The damages muſt be intended to have been given for whatever we are expreſsly charged with, and all the particulars of the treſpaſs are ſpecially and expreſsly laid in *a continuando:* Indeed, if he had declared with *a continuando* of the treſpaſs *aforeſaid* generally, the Court would apply the *prædictus* to that which might be continued; but they cannot do it againſt the expreſs allegation of the party; and an *ouſter* cannot be intended in this caſe.

HOLT, *Chief Juſtice.* I cannot ſee but that a man may lay entering into his cloſe, and hunting in his warren, with *a continuando* of the ſame, for ſeveral days: it is not indeed one continued act, that laſts from one day to another; but it is, that the defendant has 2. Salk. 638, 639.

(*a*) Year-Book 2. *Rich.* 3. pl. .
(*b*) Year-Book 21. *Hen.* 6. pl. 43. abridged by Fitzherbert, "Treſpaſs," pl. 51.
(*c*) See Yelv. 126. 1. Brownl. 223.
(*d*) Fitz. N. B. 91.
(*e*) 1. Lev. 210. S. C. 1. Sid. 319.
(*f*) Eaſter Term, 2. Queen *Anne*.

been

MONKTON *againſt* ASHLY AND OTHERS.

been hunting there daily, &c. and that is *prædict. tranſgreſſionem* continued; and I cannot agree to the caſe in *Yelverton*, but it was in favour of the judgment. But to ſay, that if treſpaſs be laid with *a continuando*, anſwering the original treſpaſs is of conſequence an anſwer to the *continuando*, ſeems ſtrange; for the *continuando* is a treſpaſs continued, which ought not to be unanſwered. If I ſay, that on ſuch a day *J. S.* entered into my wood, and cut ſo many load of wood, and carried them away, *continuando quoad* the cutting, it is ſenſeleſs, and ſo is the caſe of *Butler v. Hedges*, which you deny as to the throwing of the logs; and when ſuch treſpaſſes that lie not *in continuando* are laid with *a continuando*, the Judge ought not to ſuffer any thing to be given in evidence but the firſt act.

2. Lev. 210. 2 Sid. 319.

POWELL, *Juſtice*. Why may not the hunting lie in continuance, as well as the feeding of cattle? for as a man cannot hunt night and day inceſſantly, ſo cannot a beaſt feed; nor is the feeding yeſterday the ſame identical continued feeding in your ſenſe of unintermiſſion: yet treſpaſs *quoad depaſturacon'* is frequently laid with *a continuando*; but cutting a tree cannot, or killing ſo many rabbits ſuch a day *continuando*, or entered and took away ſo many loads of corn ſuch a day, you cannot ſay *continuando*; but the way is to ſay, that ſuch a day the defendant entered, and did ſo and ſo; and *diverſis diebus et vicibus*, between ſuch a day and ſuch a day he did, &c. and in theſe caſes there ought to be no evidence but of ſingle inſtance, and the jury can give no damage but as far as their evidence: and ſo are the caſes in the Year-Book of *Henry the Seventh* and *Richard the Third*, which you quoted.

Co. Lit. 257.

HOLT, *Chief Juſtice*, took this difference as to the *ouſter*: If you lay an *ouſter* in your declaration, you muſt lay a *re-entry*, or elſe you cannot recover the *meſne profits*; but if you enter, you may lay it with *a continuando*, if it will bear one, and recover damages for the entry and meſne profits.

* [40]

And at another day, THE WHOLE COURT * held it well, and ſaid, that a treſpaſs for proſtrating a bench with *a continuando* was held good; ſo *conculcavit et aſſumpſit* lies in continuance. Cutting certain quantity of wood lies not in continuance: But to lay that well, ſee the *Year Book* 31. *Hen.* 6. But this here is relative to no quantity, but a continuance of a ſmall kind of treſpaſs. If it had been, that he killed three rabbits that day *continuando*, it had been bad: ſo if for cutting five hundred loads of corn ſuch a day; and they in that caſe can give no more in evidence than what was on that day.

Carthew, 144. 230. Skinner, 42. 641.

JUDGMENT was given for the plaintiff.

The

The Queen *againſt* George.

Caſe 46.

A CONVICTION upon the ſtatute of 4. and 5. *Will. & Mary*, c 11. was, that the party, "*exiſtens diſſoluta perſona*," did hunt and kill ſo many hares.

A conviction for killing game muſt ſtate the negative qualification.

And it was quaſhed, becauſe it was not ſaid, that he was not qualified; for there are many diſſolute perſons worth two thouſand pounds a-year, and who are, by conſequence, qualified to hunt, &c. (*a*).

S. C. poſt. 57.

(*a*) See Rex *v.* Chip, 1. Stra. 711.; the Queen *v.* Mathews, 10. Mod. 27.; Rex *v.* Marriott, 1. Stra. 66. Rex *v.* Hill, 2. Ld. Raym. 1415. Rex *v.* Jarvis, 1. Burr. 148.; Bluet *qui tam v.* Needs, Comy. Rep. 525.; Rex *v.* Wheateman, Dougl. 331.; Rex *v.* Hall, 1. Term Rep. 320.

Anonymous.

Caſe 47.

A SPECIAL juſtification muſt be of matter of *fact*, and not of *record*; for matter of record muſt be pleaded even by an officer.

Special Juſtification.

Anonymous.

Caſe 48.

HOLT, *Chief Juſtice*. A writ of inquiry cannot be quaſhed, until it be returned and filed; but before the return it may be ſuperſeded, *quia improvidè emanavit*.

Quaſhing writ of inquiry.

Poſt. 43.

Anonymous.

Caſe 49.

HOLT, *Chief Juſtice*. If an order on which appeal lies be removed by *certiorari* before appeal, it ought not to be filed until the Court is informed of the matter; and then they will grant a *procedendo*, notwithſtanding *the certiorari*.

Poſt. 43. 83.

Order removed by *certiorari*, on which appeal lies.

Ante, 35.

12. Mod. 646.

Shepherd and Baily *againſt* Orchard.

Caſe 50.

SHEPHERD and *Baily* brought a writ of error, and made two attornies upon the *ſcire facias*: the one attorney aſſigned error; to which the defendant *took iſſue*; and then the other would plead *in abatement* of the writ.

If, on error by two, there be two attornies, and one only aſſign error on which there is iſſue, there can be no *ſeverance*.

PER CURIAM. If one of the plaintiffs had made default, he ſhould be ſevered; but if they go on, they muſt proceed jointly; and if one attorney will aſſign error, &c. without authority from both, we cannot help him.

Let him take his remedy againſt the attorney.

10. Co. 134.
1. Lev. 146.
1. Salk. 86. 88.
5. Bac Abr. 666.
Stra. 783.

Anonymous.

Caſe 51.

NOTE, If a record of this Court be pleaded, "*nul tiel record*," without more, is a compleat iſſue.

Nul tiel record.

Caſe 52.

* The Queen *againſt* Dyer.

A *conviction* on a penal ſtatute muſt ſhew that the defendant was *ſummoned*; and therefore if a conviction ſtate that "the "defendant was "ſummoned, "and did by "virtue there- "of appear on "*Tueſday* the "17th *April*," and it appears by THE ALMANACK, of which the Court is bound to take notice, that the 17th of *April* was on a *Friday*, the conviction ſhall be quaſhed; for the time of the ſummons being *impoſſible*, it is the ſame as if there had been no ſummons.

S. C. 1. Salk. 181. S. C. Holt, 157. Poſt. 96. 2. Ld. Ray. 1405. 1546. 2. Stra. 630. 10. Mod. 213. 1. Stra. 46. 2. Burr. 679. 1. Term Rep. 316.

THE defendant was convicted upon the ſtatute of 7. *Jac.* 1. c. 7. for embezzling yarn delivered to him to be woven.

The conviction begun: "WHEREAS complaint hath been "made before us, *A. B. &c.* juſtices of the peace in *C.* by *J. S.* "that on ſuch a day;" and ſets forth the charge: it further ſets forth *a ſummons* made by them to bring him in; and that by virtue thereof he appeared before them on *Tueſday* the ſeventeenth of *April*, in the year 1702.

THE OBJECTION made was, that *a ſummons* is eſſential in the caſe; and that here it appeared on the face of the conviction, that there was no ſummons, for the ſummons ſhewn is impoſſible, there being no ſuch day as *Tueſday* the ſeventeenth of *April* in that year; for the ſeventeenth of *April* in that year was on a *Friday*.

TO THIS IT WAS OFFERED *for anſwer*, that the order had been good without ſetting that matter forth; for things incidental to a juriſdiction need not be ſet forth, but things accidental muſt (*a*). A return was made to a *habeas corpus*, directed to *the chancellor of Oxford*, that he was a juſtice of peace, &c. and that the party was convicted before him for extortion, without ſetting forth the manner. It may be objected, that though perhaps it needed not to have been ſet out, yet if you go about it, you muſt do it well at your peril. But what is ſaid, is only under "*a* "*whereas*," and by way of *recital*; and the words do not ſay, that he did not appear; but ſay, that he appeared at a day impoſſible; which does not exclude an appearance at a day poſſible: and according to the rule in *Alton Wood's Caſe* (*b*), and *Plowden* (*c*), that which need not be ſhewn, if ſhewn ill, ſhall not vitiate (*d*).

HOLT, *Chief Juſtice*. Of common right the party ought to be ſummoned, if poſſible; and it would be well to ſet forth, that he was ſummoned and appeared (*e*), or did not appear, or could not be found to be ſummoned; and though the act of parliament orders that the offender ſhall be convicted, yet that muſt be intended after *ſummons*, that he may have an opportunity of making his defence; and this ſummary juriſdiction ought to be held ſtrictly to form, and every thing ought to appear regular in them; and they ought to make A MEMORANDUM, that on ſuch a day complaint was made; that thereupon a ſummons iſſued returnable on ſuch a day; and that the party being ſummoned did or would not appear, or could not be ſummoned, &c. It is abominable to convict a man behind his back.

(*a*) See the Year-Book 9. *Hen.* 6. pl. 44. and the caſe of Crefwick *v.* Rokeſby and Others, 2. Bulſt. 48.

(*b*) 1. Co. 40. Jenk. 251.

(*c*) Plowd. 32.

(*d*) See Year-Book 12. *Hen.* 7. pl. 12. 2. Jones, 50. Raym. 192. Dyer, 95.

(*e*) That the defect of the *ſummons* is cured by the *appearance* of the defendant, ſee Reg. *v.* Barrett, Salk. 383. Rex *v.* Johnſton, 1. Stra. 261. Rex *v.* Aikin, 3. Burr. 1785.

And

And ALL THE COURT AGREED, that of common right there ought to be *a ſummons*; and that THE ALMANACK is part of the LAW OF ENGLAND, of which the Court muſt take judicial notice (*a*); and that nothing could make this good but an intendment, that the juſtice would not convict one without a ſummons. THE QUEEN *againſt* DYER.

* POWELL, *Juſtice*, ſaid, that if an action were brought againſt an officer upon execution of this conviction, it would not lie, for an erroneous conviction would juſtify him (*b*). Indeed, if you had ſhewed no ſummons, perhaps the Court would intend one, according to precedents; but here you ſhew a ſummons, and an appearance at a day impoſſible: and he ſaid that my LORD HALE uſed to ſay, there ought to be a ſummons. *[42]

And for the ſaid objection, the conviction was quaſhed PER TOTAM CURIAM, the laſt day of *Hilary Term* after.

(*a*) Poſt. 81. 160. 252. 1. Lev. 242. 95. Hard. 484. Strange, 1002. 1. Wils. (*b*) See on this ſubject, 10. Co 76. 153. 2. Wils. 205. 275. 292. 1. Bl. Cro. Car. 602. 1. Vent. 273. 1. Lev. Rep. 555.

Anonymous. Caſe 53.

PER HOLT, *Chief Juſtice*. No man that keeps a *publick-houſe* ought to be A CONSTABLE. Conſtable. 1 Ld. Ray. 138.

Anonymous. Caſe 54.

NOTE *per* HOLT, *Chief Juſtice*. If, before a writ be taken out, an attorney promiſe to *appear* to it, and it is afterwards taken out, and ſhewed to him, he ought to appear; but that is no actual appearance; but if ſuch undertaking be after the writ is actually taken out, it is an appearance. If an attorney undertake to appear, he ſhall be compelled to file appearance. Ante, 16.

Poſt. 86. 1. Stra. 114. 445. 693. and ſee the rule upon this ſubject, Mich. Term 1654, Tidd's Prac. 124.

The Queen *againſt* Orbell. Caſe 55.

THE INDICTMENT ſtated, that the defendant fraudulently, and *per conſpirationem*, to cheat *J. S.* of his money, got him to lay a certain ſum of money upon *a foot-race*, and prevailed with the party to run booty. Indictment for cheating upon a foot-race. S. C. 12. Mod. 499. 2. Show. 341. Poſt. 61. 105. 301. Ld. Ray. 865.

THE COURT would not quaſh it upon motion (*a*), for they ſaid, that being *a cheat*, though it was private in the particular, yet it was publick in its conſequences.

AND NOTE, The defendant, after this motion, would not plead till he was ſerved with a peremptory rule. After a peremptory rule to plead to an indictment for a miſdemeanor, it ſhall be tried the ſame Term.—Poſt. 114. 4. Com. Dig. "Indictment" (L).

(*a*) See 4. Com. Dig. "Indictment," (H.)

THE QUEEN *againſt* ORBELL.

And for that reaſon, by the courſe of the Court, it was ſaid, that his plea ought not to be received without bail to try it the ſame Term; whereas if he had pleaded freely, he need not try it till the next Term.

And ordered PER CURIAM, to give bail to try it this Term, or the ſitting after.

Caſe 56. Chetly *againſt* Wood.

In debt on a recognizance in the Common Pleas, if the declaration ſtate it as taken before SIR GEORGE TREBY *et ſociis ſuis*, and it appear to have been taken before another Judge at chambers, and by him delivered to the Court, *the variance* is fatal.

IN debt upon a recognizance, the plaintiff ſet forth a recognizance acknowledged in the court of common pleas before SIR GEORGE TREBY, *et ſociis ſuis*; and upon *nul tiel record* pleaded, the record was produced, and was a recognizance taken before JUSTICE NEVIL, in his chamber in *London*, and brought by him and delivered into court after at *Weſtminſter*.

The queſtion was, Whether this were *a failure of record?*

It was agreed, that recognizances in this court are always entered as preſent in court, and never mention a day certain; but in the court of common pleas they make an entry of a recognizance entered into at a Judge's chamber on a day certain, and there it binds land from the very day of the caption, and a *ſcire facias* may be brought upon it in either county, that is, in *London* or in *Middleſex* (*a*).

S. P. poſt. 132. S.C. 1. Salk. 564.

* [43]

S.C. 2. Salk. 659. S. C. Holt, 612. S. C. Ld. Ray. 966. 8. Mod. 290. 11. Mod. 45. 53. 223. 253. Ld. Ray. 84. 757. 819. 1141. 1170. 1515. 1. Wms 334. 340.

* And being moved again at another day, it was offered, that it was a conſtant practice in the common pleas, for above theſe twenty years, to recite recognizances taken at Judges chambers, as taken in court.

To which HOLT, *Chief Juſtice*, anſwered, Then they muſt make their entry ſo, or elſe their uſage is contrary to law, and not to be regarded; but here the entry is made, that the recognizance was taken in *London* before a Judge in his chamber.

And PER TOTAM CURIAM, here is a variance (*b*).

(*a*) See the caſe of Hall v. Winchfield, Hob. 195.

(*b*) See Rex v. Lookup cited 1. Term Rep. 240.

Caſe 57. Anonymous.

Juſtices of peace need not ſign the *return* of *certiorari*.

A WRIT of *certiorari* was directed to juſtices of the peace to remove an indictment of forcible entry, and the return was void.

PER CURIAM. The juſtices names need not be ſubſcribed to it, but it ſhould be *reſponſio juſticiar. &c. patet*; and it ſhould ſtate them to be juſtices *of our lady the queen*.

But

But before this was diſcovered it was filed, and the recognizance into which the party had entered, for laying the cauſe in purſuance of late act of parliament (*a*), was eſtreated.

A *certiorari* to remove an indictment is no *ſuperſedeas*, unleſs recognizance be given, purſuant to the 5. and 6. *Will. & Mary*, c. 11.

And THE COURT ſaid, that if the party that removes an indictment by *certiorari* do not enter into recognizance to try it the next aſſize or Term, or at the ſitting within the Term, the *certiorari* is no *ſuperſedeas* (*b*).

10. Mod. 193. 1. Burr. 11. Burr. 1462.

SECONDLY, That failing of trying is a forfeiture of recognizance, after which they will not hear a motion in arreſt of judgment.

No motion in arreſt of judgment after recognizance forfeited.

But they doubted whether for this want of a due return, being a kind of *album breve*, they ſhould order the juſtices to make a return, and reſpite the recognizance in the mean time.

NOTE PER CURIAM. After *certiorari* returned and filed, no *procedendo* can go (*c*).

No *procedendo* after *certiorari* filed.

(*a*) 5. and 6. *Will. & Mary*, c. 11. and 8. and 9. *Will.* 3. c. 33. See 2. Hawk. P. C. ch. 27. ſ. 48.

(*b*) See the Queen *v.* Bothel, ante, 33.

(*c*) See the Queen *v.* Bothel, ante, 33. Anonymous, ante, 40.; The Queen *v.* Dixon, poſt. 61.: but if the cauſe ſuggeſted to obtain a *certiorari* ſhall appear to be falſe, a *procedendo* ſhall go, although the return be filed, Anonymous, 1. Salk. 144. but the writ muſt be firſt ſuperſeded, *quia improvidè emanavit*; and the return be taken off the file, Rex *v.* Wakefield, 1. Burr. 488. for a *procedendo* cannot be moved for while it is upon the file, Rex *v.* Lewis, 4. Burr. 2459.

Anonymous. Caſe 58.

PER CURIAM. If a number of perſons meet peaceably on a lawful occaſion, and a ſudden fray happen between them, it cannot be made *a riot*; but if ſeveral meet upon an unlawful occaſion, and a ſudden fray happen between them, and a perſon who came upon a lawful occaſion join in the fray (*a*), it may make him a rioter as well as the reſt.

What ſhall conſtitute A RIOT. Skin. 118. 1. Salk. 595. 1. Hawk. P. C. ch. 65. ſ. 3. 4. Com. Dig. "Forcible Entry" (D. 8.).

(*a*) See the caſe of Rex *v.* Royce, Burr. 2073.

Anonymous. Caſe 59.

HOLT, *Chief Juſtice*. You cannot except againſt a juror upon a writ of inquiry.

No exception to a juror on a writ of enquiry.

Ante, 40. Carth. 70. 86. 362. 371.

Anonymous. Caſe 60.

INDICTMENT for exerciſing *artem myſteriam, ſive occupationem des les taylors*, not having ſerved, &c. quaſhed (*a*).

Indictment on 5. *Eliz.* c. 4.

(*a*) See the caſe of Daviſon *v.* Barber, Hob. 183.

Caſe 61.

The Queen *againſt* Croſſe.

An *attachment* lies for ſpeaking contemptuouſly *of the Court* on being arreſted.

CROSSE confeſſed on interrogatories, that a *copy of a writ* being ſerved upon him, and the writ ſhewed, and before he knew the contents of it, or out of what court it was, he had ſpoke with contempt; and this was judged a contempt.

Poſt. 74. 7. Mod. 31. 1. Salk. 84. 1. Stra. 185. 567. Sayer, 47. 114. 2. Stra. 1068. Ld. Ray. 1364. 2. Com. Dig. "Chancery," (D. 3.) 2. Hawk. P. C. ch. 22. ſ. 36.

Caſe 62.

* The College of Phyſicians *againſt* Roſe.

An *apothecary* viſiting a patient, judging of his diſeaſe, and ſending in medicines for its cure, is not a *practiſing of phyſick* contrary to the 14. and 15. *Hen.* 8. c. 5. provided he only charge for the *medicines, &c.*

S. C. 16. Viner, 341.
S. C. 3. Salk. 17.
S. C. 1. Brown, P. C. 78.
2. Salk. 451.
2. Show. 158.
4. Mod. 47.
5. Mod. 327.
Comy. 79.

AN action on the ſtatute 14. & 15. *Hen.* 8. c. 5. for practiſing phyſick within ſeven miles of *London* without licence.

The caſe, upon a ſpecial verdict, was, that the defendant being *an apothecary* by trade, was ſent to by *John Scale*, then ſick of a certain diſtemper; and he having ſeen, and being informed of the ſaid diſtemper, did, without preſcription or advice of *a doctor*, and without any fee for advice, compound and ſend to the ſaid *John Scale* ſeveral parcels of phyſick as proper for his ſaid diſtemper, only taking the price of his drugs.

The queſtion was, Whether this is a practiſing of phyſick, ſuch as is prohibited by the ſtatute?

And after ſeveral arguments, THE COURT at laſt unanimouſly agreed, that practiſing of phyſick within this ſtatute, conſiſts,

FIRST, In judging of the diſeaſe and its nature, from the conſtitution of the patient, and many other circumſtances.

SECONDLY, In judging of the fitteſt and propereſt remedy for the diſeaſe.

THIRDLY, In directing or ordering the application of the remedy to the diſeaſe: and that the proper buſineſs of *an apothecary* is to make and compound, or prepare the preſcriptions of *the doctor* purſuant to his directions.

AND IT WAS AGREED, that the defendant's taking upon himſelf to ſend phyſick to a patient as proper for his diſtemper without taking aught for his pains, is plainly a taking upon himſelf to judge of the diſeaſe and fitneſs of remedy, as alſo the executive or directing part.

ET PER TOTAM CURIAM, The plaintiff had judgment.

NOTE, This judgment was reverſed in the houſe of lords, *et juſtè, &c.*

Caſe 63.

Ford *againſt* Lord Grey.

In ejectment, the poſſeſſion of one jointenant is the poſſeſſion of the other, ſo as to prevent the ſtatute of Limitation.

AT a trial at bar in ejectment, the *ſtatute of Limitation* being pleaded, theſe ſeveral points were ruled upon evidence:

—5. Mod. 385. 2. Jones, 27. Salk. 205. 3. Burr. 2635. Run. Eject. 17.

FIRST,

FIRST, That the poſſeſſion of one *jointenant* is the poſſeſſion of the other, ſo as to prevent the ſtatute (*a*). FOR *againſt* LORD GREY,

SECONDLY, That in proving an entry and claim, it is neceſſary to prove the claim to be upon the land claimed (without ſpecial cauſe): and alſo that it be *animo clamandi*. Evidence of a claim. S.C. 1. Salk. 285. Co. Lit. 253.

3. Wils. 523. 3. Com. Dig. "Claim," (A. 2.)

THIRDLY, If a man make an anſwer in chancery prejudicial to his title, and afterwards convey away his eſtate, this anſwer cannot be read againſt the alienee by any claiming under the alienor. Anſwer of *alienor* cannot be read againſt *alienee*.

2. Vent. 72. 3. Mod. 259. 4. Com. Dig. "Evidence," (C. 3.)

FOURTHLY, That the recital of a leaſe in a deed of releaſe, is good evidence of a leaſe againſt the releaſor, and thoſe that claim under him. The recital of a leaſe is evidence of a leaſe. 2. Lev. 108, 109.

* FIFTHLY, A fine was produced, but no deed declaring the uſes; but a deed was offered in evidence which did recite a deed of limitation of the uſes; and the queſtion was, Whether that was evidence?—And THE COURT ſaid, that the bare recital of a deed was not evidence; but that if it could be proved that ſuch a deed had been, and loſt, it would do if it were recited in another. And it not being proved that ever there was a deed leading the uſes of the fine, the Counſel of one ſide oppoſed the ſame deed of recital's being at all read: but THE COURT ſaid, "We cannot hinder the "reading of a deed under ſeal; but what uſe is to be made of it, "is another thing." * [45] The bare recital of a deed of uſes upon a fine, is evidence of it when the deed is loſt. Prec. Ch. 59. 64. 116. Ld Ray. 154. 746. 801. 12. Mod. 24. 231. 494. 579. 339. 10. Mod. 42. 4. Com. Dig. "Evidence" (B. 5.).

SIXTHLY, A deed bore date in the twenty-ſecond year of *Charles the Second*, in the year of Our Lord 11671. And notwithſtanding that miſtake, the year of the king being certain, it was well. A deed is good, though *anno Domini* be miſtaken. Co. Lit. 6. a.

2. Co. 5. 2. Roll. Abr. 21. 1. Salk. 462. 4. Com. Dig. "Fait" (B. 3.).

SEVENTHLY, If there be two joint-tenants in fee, and one of them levy a fine of the whole, this amounts to no *ouſter* of his companion, but it is *a ſeverance* of the jointure, though he be in of the old uſe again; as if a man ſeiſed of a manor levy a fine of the *demeſnes*, the manor is gone for ever, *Sir Moyle Finch's Caſe*; and after the fine, though he has the ſame old eſtate, yet he has it in another manner; for the fine, being *ſur conuſance de droit come ceo*, preſuppoſes a feoffment; and if one ſeiſed as heir to the mother, levy A FINE *ſur grant et render*, the eſtate ſhall go to the part of the father (*b*); otherwiſe of other fines. If one joint-tenant levy a fine of the whole, it is a ſeverance, although it be to the old uſes. Hob. 27. Co. Lit. 191. 337. Jones, 58. Prec. Ch. 124.

Stra. 18. 4. Com. Dig. "Eſtates" (K. 5.).

EIGHTHLY, A deed of title to leſſor of the plaintiff of a will, (ſuppoſe, except *Black-acre*,) the *ſtatute of Limitation* being pleaded, and an entry and claim being offered in evidence to avoid it, they were put to prove the entry to have been in another place than was excepted. Entry upon an exception. Salk. 391. Ld. Ray. 750.

(*a*) See Empſon *v.* Shackleton, 2. Bl. Rep. 690. and S. C. 5. Burr. 2604.

(*b*) See 3. Com. Dig. "Diſcent" (C. 7.).

Caſe 64.

Aſhby *againſt* White.

Record of an action on the caſe brought by *a voter* againſt the *returning officer* for refuſing to take his *poll* at the election of a member of parliament.

BUCKINGHAMSHIRE, *to wit.* } MATTHIAS ASHBY complains of *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, being in the cuſtody of the marſhal of the *Marſhalſea* of the lord the king before the king himſelf, for that, to wit, That whereas on the twenty-ſixth day of *November*, in the twelfth year of the reign of the lord the now king, a certain writ of the ſaid lord the now king iſſued out of the court of chancery of him the ſaid lord the now king at *Weſtminſter* in the county of *Middleſex*, directed to the then ſheriff of *Buckinghamſhire* aforeſaid, reciting that the ſaid lord the king, by the advice and aſſent of his council, for certain arduous and urgent buſineſſes concerning him the ſaid lord the king, the ſtate, and the defence of his realm of *England*, and of the church of *England*, had ordained his certain parliament to be holden at his city of *Weſtminſter* on the ſixth day of *February* then next coming, and there with the prelates, nobles, and peers of his ſaid kingdom to have diſcourſe and treaty, the ſaid lord the now king commanded the then ſheriff of *Buckinghamſhire* by the ſaid writ firmly enjoining, that, having made proclamation in his next ſaid county after the receipt of the ſaid writ to be holden, of the day and place aforeſaid, two knights girded with ſwords, the moſt fitting and diſcreet of the county aforeſaid, and of every city of that county, two citizens, and of every borough two burgeſſes of the more diſcreet and moſt ſufficient, ſhould be freely and indifferently choſen by thoſe whom ſuch proclamation ſhould concern, according to the form of the ſtatute thereupon made and provided, and the names of the ſame knights, citizens, and burgeſſes ſo to be choſen, to be inſerted in certain indentures thereof to be made between him the then ſheriff and thoſe who ſhould be concerned at ſuch election (although ſuch perſons to be choſen ſhould be preſent or abſent), and ſhould cauſe them to come at the ſaid day and place, ſo that they the ſaid knights, citizens, and burgeſſes, might ſeverally have full and ſufficient power for themſelves and the commonalty of the county, cities, and boroughs aforeſaid, to do and conſent to thoſe things which ſhould then happen to be ordained there of the common-council of the ſaid realm of him the ſaid lord the now king (by God's aſſiſtance), upon the buſineſſes aforeſaid, ſo that for want of ſuch power, or becauſe of an improvident election of the knights, citizens, and burgeſſes aforeſaid, the ſaid buſineſſes might not in any wiſe remain undone, and ſhould certify without delay that election made in the full county of him the then ſheriff, diſtinctly and openly under his ſeal and the ſeals of thoſe who ſhould be concerned at that election, to the ſaid lord the now king in his chancery at the ſaid day and place, ſending to him the ſaid lord the king the counterpart of the indenture aforeſaid, ſewed to the ſame writ together with that writ; which ſaid writ afterwards, and before

the

the ſixth day of *February*, in the writ aforeſaid mentioned, to wit, on the twenty-ninth day of *December*, in the twelfth year aboveſaid, at the borough of *Ayleſbury* in the ſaid county of *Bucks*, was delivered to one *Robert Weedon*, *Eſq.* then ſheriff of the ſame county of *Bucks*, to be executed in form of law; by virtue of which ſaid writ the aforeſaid *Robert Weedon* being then and there ſheriff of the county of *Bucks* aforeſaid, as before is ſet forth, afterwards, and before the aforeſaid ſixth day of *February*, to wit, on the thirtieth day of *December*, in the twelfth year aboveſaid, at the borough of *Ayleſbury* aforeſaid in the ſaid county of *Bucks*, made his certain precept in writing under the ſeal of him the ſaid *Robert Weedon* of his office of ſheriff of the county of *Bucks* aforeſaid, directed to the conſtables of the borough of *Ayleſbury* aforeſaid, reciting the day and place of the parliament aforeſaid to be holden, thereby requiring them and giving to them in command, that having made proclamation within the borough aforeſaid of the day and place in the ſame precept recited, they ſhould cauſe to be freely and indifferently choſen two burgeſſes of that borough of the more diſcreet and moſt ſufficient, by thoſe whom ſuch proclamation ſhould concern according to the form of the ſtatutes in ſuch caſes made and provided, and the names of the ſaid burgeſſes ſo elected (although they ſhould be preſent or abſent), to be inſerted in certain indentures between the ſaid ſheriff and thoſe who ſhould have intereſt in ſuch election, and that he ſhould cauſe them to come at the day and place in the ſame precept recited, ſo that the ſaid burgeſſes might have full and ſufficient power for themſelves and the commonalty of the borough aforeſaid to do and conſent to thoſe things which ſhould then happen to be ordained there of the common-council of the ſaid realm (by God's aſſiſtance) upon the buſineſſes aforeſaid, ſo that for want of ſuch power, or becauſe of an improvident election of the burgeſſes aforeſaid the ſaid buſineſſes might not remain undone, and that they ſhould without delay certify the election to him the ſaid then ſheriff, ſending to the ſame ſheriff the counterpart of the indenture aforeſaid annexed to the ſaid precept, that he the ſaid ſheriff might certify the ſame to the ſaid lord the king in his chancery at the day and place aforeſaid; which ſaid precept afterwards, and before the ſaid ſixth day of *February*, to wit, on the ſame thirtieth day of *December* in the year aboveſaid, at the borough of *Ayleſbury* aforeſaid in the ſaid county of *Bucks*, was delivered to them the ſaid *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon* then, and until and after the return of the ſame writ being conſtables of the borough of *Ayleſbury* aforeſaid, to be executed in form of law; to which ſaid *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, by reaſon of their office of conſtables of the borough aforeſaid, the execution of that precept of right did then and there belong: by virtue of which ſaid precept, and by force of the writ aforeſaid, they the ſaid burgeſſes of the borough of *Ayleſbury*, being in that behalf duly forewarned, afterwards, and before the ſixth day of *February*, to wit,

Assay *againſt* White.

on

ASHBY against WHITE.

on the ſixth day of *January*, in the twelfth year aboveſaid, at the borough of *Ayleſbury* aforeſaid, before them the ſaid *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, the conſtables aforeſaid, were aſſembled to elect two burgeſſes for the borough according to the exigency of the writ and precept aforeſaid, and during that aſſembly to that intention, and before ſuch two burgeſſes, by virtue of the writ and precept aforeſaid, were elected, to wit, on the day and year laſt aboveſaid, at the borough of *Ayleſbury* aforeſaid, in the county aforeſaid, he the ſaid *Matthias Aſhby* then and there being a burgeſs and an inhabitant of the borough aforeſaid, and not receiving alms there or any where elſe then or before, but being duly qualified and intitled to give his vote for the chooſing of two burgeſſes for the borough aforeſaid, according to the exigency of the writ and precept aforeſaid, before them the ſaid *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, the four conſtables of that borough, to whom then and there it did duly belong to take and allow the vote of him the ſaid *Matthias Aſhby* of and in the premiſes, was ready and offered to give his vote for chooſing *Sir Thomas Lee*, *Bart.* and *Simon Mayne*, *Eſq.* two burgeſſes for that parliament, by virtue and according to the exigency of the writ and precept aforeſaid; and the vote of him the ſaid *Matthias* then and there of right ought to have been admitted, and the aforeſaid *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, ſo being then and there conſtables of the borough aforeſaid, were then and there requeſted to receive and allow the vote of him the ſaid *Matthias Aſhby* in the premiſes: nevertheleſs, they the ſaid *William White*, *Richard Talbois*, *William Bell*, and *Richard Heydon*, being then and there conſtables of the borough aforeſaid, well knowing the premiſes, but contriving and fraudulently and maliciouſly intending to damnify him the ſaid *Matthias Aſhby* in this behalf, and wholly to hinder and diſappoint him of his privilege of and in the premiſes, did then and there hinder him the ſaid *Matthias Aſhby* to give his vote in that behalf, and did then and there abſolutely refuſe to permit him the ſaid *Matthias Aſhby* to give his vote for chooſing two burgeſſes for that borough to the parliament aforeſaid, and did not receive, nor did they allow the vote of him the ſaid *Matthias Aſhby* for that election: and two burgeſſes of that borough were elected for the parliament aforeſaid (he the ſaid *Matthias Aſhby* being excluded as before is ſet forth), without any vote of him the ſaid *Matthias Aſhby*, then and there by virtue of the writ and precept aforeſaid, to the enervation of the aforeſaid privilege of him the ſaid *Matthias Aſhby*, of and in the premiſes aforeſaid: whereupon the ſaid *Matthias Aſhby* ſaith that he is injured, and hath ſuſtained damage to the value of two hundred pounds, and thereupon he brings ſuit, &c.

Aſhby *againſt* White. Caſe 65.

IN an action on the caſe, the plaintiff declared, that on ſuch a day in *December*, in the twelfth year of the late king, there iſſued a writ to the *ſheriff of Bucks* for the election of members of parliament in his county; that the ſaid writ was delivered to the ſaid ſheriff; whereupon the ſheriff made his warrant to the *conſtable of Aileſbury*, to chooſe *two burgeſſes* for that borough, which warrant was delivered to the ſaid conſtable: that in purſuance thereof the burgeſſes were duly aſſembled to chooſe, &c.; that the plaintiff being then duly qualified to give his voice for the election of two burgeſſes before the ſaid *White*, he was ready to give his voice for *Lee* and *Mayne* to be burgeſſes of parliament for the ſaid borough; and that the defendant, knowing the premiſes, with malice, &c. did obſtruct him from giving his voice, and did refuſe it, and not allow or receive it, and that two burgeſſes were choſe without allowing or receiving his voice: Verdict for the plaintiff.

A perſon who has a right to vote for the election of members to ſerve in parliament, may maintain an action againſt the ſheriff or other officer who takes the poll, for refuſing to admit his vote, although the right of ſuch elector to vote was never determined in parliament, and although the candidate for whom he tendered his vote, was returned *duly elected* by the officer who refuſed the vote.

And now THE COURT argued *ſeriatim*, THREE JUDGES againſt the plaintiff, and HOLT, *Chief Juſtice*, *totis viribus* for him.

* GOULD, *puiſne Juſtice*, againſt plaintiff, for four reaſons:

* [46]

FIRST, The conſtable in this caſe is to judge who ſhall vote or not, and as ſuch is not liable to actions: a ſheriff ſhall not be liable to an action for taking inſufficient bail, becauſe he is judge of their ſufficiency (*a*). An action for taking bail, having nothing in the county, does not lie (*b*). In an action of eſcape upon proceſs, the defendant pleads, that he let him go upon ſufficient bail, and it was held that the ſufficiency of the bail is not traverſable (*c*). In the caſe of *Hammond v. Howell* (*d*), the jury were fined for a verdict againſt evidence, and held ill: and in the *Year-Book* it is held, that (*e*) a Judge is not liable to an action for making up a falſe record.

S.C. 1. Salk. 19. S. C. 3. Salk. 17. S. C. 8. St. Tr. 89. S. C. Holt, 524. S. C. 1. Brown. P. C. 45. S C. Ray. Ent. 320. S.C. 2. Ld. Ray. 938. Poſt. 49. 2. Lev. 114. 1. Mod. 145. 5. Mod. 311. 7. Mod. 13. Pollexf. 470. 2. Salk. 503. 10. Mod. 54. 12. Mod. 26. Ld. Ray. 907. Vide poſtea.

SECONDLY, This is a parliamentary offence, with which we have nothing to do by way of action; for we cannot examine, whether the party refuſed has a right to vote, or not, for that properly belongs to THE HOUSE OF COMMONS to determine; and ſuppoſe the queſtion be, Whether the right of voting be in a ſelect number, or in the populace? and the defendant refuſe the plaintiff for being of the populace; and we judge him to have the right of voting, being of the populace, and upon that ground give judgment for the plaintiff, and after the right of election in that borough comes in queſtion in parliament, and there the right is adjudged to be in a ſelect number; this will occaſion a concurrency of independent juriſdictions, which will be wonderfully inconvenient. In the caſe of *Dawſon v. Sheriff of London* (*f*), it is held, that

(*a*) Metcalf *v.* Hodgſon, Hutton, 120.
(*b*) In the king's bench, 21. *Car.* 2. Roll. 469.
(*c*)
(*d*) 2. Mod. 219.
(*e*) Year-Book 9. *Hen.* 6. pl. 6.
(*f*) 2. Vent. 87.

even

ABBEY against WHITE.

even for a falſe return an action does not lie, for there are no precedents of any before the ſtatute of *Hen.* 6. c.

THIRDLY, Here is no profit preſent, or poſſibility of a future profit, ſo it is an *injuria ſine damno*; and *damnum ſine injuriâ*, or, *vice verſâ*, will not bear an action, for both muſt neceſſarily concur to maintain the action; for things muſt not only be done amiſs, but it muſt redound to the prejudice of him that will bring his action for it (*a*). If a man forge a bond in my name, it is poſſible I may be damnified by it, but until it be put in ſuit againſt me, I cannot bring action againſt the forger (*b*).

FOURTHLY, This relates to the government, and is a kind of a popular offence, and for that an action will not lie for it; for by the ſame reaſon that an action would lie for the plaintiff, it might lie for two hundred upon the ſame ſingle queſtion; and ſuppoſe we all ſhould give judgment in ſo many actions againſt him, and after the matter is decided otherwiſe in parliament, what remedy has this poor officer? and the avoiding multiplicity of actions, is the reaſon of *Williams' Caſe* (*c*). And *Boulſton's Caſe* in the ſame book (*d*), Actions lie not by any particular perſon againſt one that not being qualified builds a dove-cote, but is puniſhable in the leet; but I do not ſay but that after the right is determined in parliament, it might be proper for an information (*e*). As to the reaſon that ſuch action never has been, therefore it does not lie, I do not much depend upon it. In the caſe of *Guntley v. Holmes* (*f*), there is no remedy there for the party grieved but an action, but here is a remedy in parliament. Beſides theſe reaſons, it is not alledged that any return * was made of the members choſe without his conſent or vote, and the action does not lie to be ſued before the return (*g*), for until then the party has no damage.

*[47]

Poſt. 122.

POWYS, *Juſtice*, *accord.* for theſe reaſons:

FIRST, The officer in this caſe, though not properly and ſtrictly a judge, yet he is *quaſi* a judge; for he has a diſtinguiſhing power who ſhall be admitted to vote, and who not; not indeed finally and concluſively, but at that time who to admit, and who to refuſe; but all he does is obnoxious to a ſubſequent examination in parliament.

SECONDLY, If ſuch an officer miſbehave himſelf, in certain caſes acts of parliament have already given remedy; and this caſe may come incidently in queſtion, and be determined upon ſuch actions as the ſtatutes have provided; and the ſtatute giving

(*a*) Year-Book 19. *Hen.* 6. c. 24.

(*b*) Year-Book 6 *Edw.* 4. pl. 7. 19. *Hen.* 6. pl 44. cited in the caſe of Wateris v. Freeman, Hob. 267. See alſo Fuller v. Young, 2. Bulſt. 268.

(*c*) 5. Co. 73.

(*d*) 5. Co. 104.

(*e*) See 2. Brownl. 194. Cro. Jac. 268. upon the ſame reaſon.

(*f*) 2. Cro. See alſo Herring v. Finch, 2. Lev. 250. Turner v. Sir Samuel Sterling, 2. Vent. 25.

(*g*) 2. Bulſt. 255.

remedy

remedy in one caſe, and being ſilent in all other caſes, ſeems to expound the common law in this point.

THIRDLY, This would ſubject mayors and ſuch officers to ſuch an infinity of actions, as would not only ruin them, but alſo deter every body from exerciſing the like office; for the heats in elections are ſo great, that the loſing party would never fail of bringing every man his action, which the Court could not join in one, and ſo the poor officer would be undone; whereas the whole matter might be fairly determined by an action for a falſe return by either candidate, according to the ſtatute.

FOURTHLY, There is ſuch intricacy in elections, that ſcarce any two towns agree: in ſome boroughs, a ſelect number has the government: in ſome, all that pay ſcot and lot: in ſome, pot-wallers, or houſe-keepers, &c. ſo that it would be hard to make an officer diſtinguiſh them at the peril of an action.

It is objected, that by law every man that has an injury done him, ought to have a remedy therefor; and that it would be ſtrange to tell *an Engliſhman*, that he has a wrong done him, and no redreſs for it. I ANSWER, This is no wrong to him, for he does not loſe his privilege of voting by it; for if an action be brought for a falſe return, or a petition be preferred to THE HOUSE, if he has a right, THE HOUSE will reckon his vote as much as if it had been received at the election (*a*); and beſides, if it be an injury, it may be one of thoſe that come within the rule, *De minimis non curat lex*. Before the ſtatute of 23. *Hen.* 6. c. 14. the party it cited had no remedy in caſe of *falſe return* (*b*); and before the ſtatute of 7. and 8. *Will.* 3. c. 7. no action lay for a *double return* (*c*).

FIFTHLY, That ſuch an action was never brought before, and then LITTLETON's argument on the *ſtatute of Merton* (*d*), which though it be not a concluſive reaſon, yet thus far it may be urged, that it ſhews the law is not apt to encourage actions where none was brought ever before: and it is ſaid in *Onſlow's Caſe*, that * the parliament could not be miſconuſant of double returns, and therefore, if they had thought it convenient, they would have provided a remedy. It may in like manner be ſaid here, they could not be miſconuſant of denying of burgeſſes their votes. * [48]

SIXTHLY, The determination of all diſputes concerning elections properly belongs to THE HOUSE to determine, and it is a fundamental right of theirs to determine who are to be the conſtituent members of their own body; and the right deciſion of theſe things depends upon a parliamentary kind of learning, whereof moſt people are ignorant, as we may ſee by their being daily decided within THE HOUSE contrary to the opinions of all

(*a*) Ford *v.* Hoſkins, Cro. Jac. 368. S. C. Moor, 842. S. C. 1. Roll. Rep. 125. S. C. 2. Bulſt. 326.

(*b*) See Onſlow *v.* Rapley, 3. Lev. 29. S. C. 2. Vent. 37.

(*c*) Vide Cro. 142.

(*d*)

people

ABBY *againſt* WHITE.

people out of doors: and now in actions for falſe return, the laſt determination in parliament is what we muſt be concluded by.

SEVENTHLY, The claſhing of juriſdictions that would be.

And as to the caſe of *Sterling v. Turner* (*a*), it is not like this; for that depended on a private cuſtom of a corporation, and this here is parliamentary; and he quoted *Onſlow's Caſe* (*b*), that the courts of *Weſtminſter Hall* muſt not enlarge their juriſdiction (*c*).

Poſt. 55. 100.
3. Lev. 29.
2. Lev. 114.

As to the pleading, though he agreed that it would be bad on demurrer, for the generality of the allegation, "that he was ready to "give his vote, and that they hindered him, &c." yet after verdict he held it well enough. And he concluded for the defendant.

POWELL, *Juſtice*. At the firſt opening of this caſe I was ſurprized with the novelty thereof, but that is no reaſon againſt it; for many actions are daily brought, the like whereof was never brought before. I do not agree with my brothers, that the officer here is *a judge*; nor do I know what *quaſi* a judge is: ſure this officer is only *a miniſter* to execute the ſheriff's precept. But what moves me to be of opinion againſt the plaintiff is, that this is not ſuch an injury or damage to the plaintiff as will maintain an action on the caſe; for *injury* is in relation to ſome *right* a man has, except it be where a man is hindered from trying whether he has a right or not, as was the caſe of *Turner v. Sterling* (*d*); and the caſe of *Ford v. Hoſkins* (*e*) was upon ſolemn debate, and it was compared to the caſe of *ceſtuy que uſe* who could not maintain caſe againſt the feoffee for not executing poſſeſſion. However, let that caſe be as it will, it does not oppoſe the *Caſe of Sterling*; for there was an old remedy in chancery to compel the lord to hold his court, in that caſe; and in the other, there was no manner of remedy but an action upon the caſe. It is objected, that the party here ſhews he has *a right*, and the jury find it upon their oaths. I anſwer, that his own allegation does not give him a right, and the jury are not judges whether he has a right or not; for it is a matter ſolely inquirable and determinable in parliament by their committee of election, whether their members be choſe as they ought to be, * and what is that but to determine the right of voting? And there is no doubt but they have conuſance of that matter. But it may be objected, that the determination of the right in parliament does not avail the party injured of his vote, nor repair him in damages. I anſwer, that at leaſt you come too ſoon for this action, before it be determined in parliament whether you have a right; and indeed, if it may be called *a right*, it is ſo dubious and uncertain a right, that it is extremely hard to ſay, until it be determined, that a man may be injured in it ſo as to bear an action:

* [49]

(*a*) 2. Lev. 50. 3. Keb. 26. 32. 1. Vent. 206. 2. Vent. 25.
(*b*) 2. Vent. 37.
(*c*) 2. Bulſt. 368.
(*d*) 2. Lev. 50. 3. Keb. 26. 32. 1. Vent. 206. 2. Vent. 25.
(*e*) Cro. Jac. 368. Moor, 842. 1. Roll. Rep. 125. 2. Bulſt. 326.

and

and the plaintiff has a proper remedy, if he has a right, by application in parliament; and when the matter is there determined, he may then bring his action for his damages; for I agree, it would be hard to ſuppoſe an injury without the means for a reparation in damages. There be but few caſes in our Books to this purpoſe, but the caſe in *Hob.* 318. comes up to the reaſon of it: If a church become litigious, ſo that there are two perſons in conteſt about it, the ordinary's ſafe way is to aſcertain the title by a *jure patronatûs*: if, after, he admit the wrong perſon, contrary to the inqueſt of the *jure patronatûs*, and the rightful patron recover in *a quare impedit*, he ſhall after have an action on the caſe againſt the ordinary, but not before the right is determined in a former action. So here you ſhould aſcertain your right in a proper way, and then bring your action: and there is great reaſon for this, for the right may be determined quite contrary by parliament; and if we give damages and judgment againſt the defendant, and after the matter comes before the parliament, who determine againſt the plaintiff, What remedy has the defendant? This is a monſtrous miſchief, only to be prevented by ſtaying until the matter be determined in parliament.

Ante, 45. 2. Lev. 50. 114. 2. Keb. 435. Pollex. 470. 2. Keb. 356. 664. 433. Lutw. 88, 89, &c.

BESIDES, as it appears on *the declaration*, there is not ſufficient damages to maintain it; for every injury, to maintain an action, muſt have a real preſent damage, or a poſſibility of a future one: as where one has a market and toll, and another is coming with goods to the market, for which, if ſold, toll would be due, and a third perſon hinders him from coming to the market, an action lies for the lord of the market, becauſe of the poſſibility of damages.

ANOTHER FAULT in the declaration is, that he does not particularly tell how the defendant obſtructed him, as that he ſhut him out; and though it be after verdict, yet the declaration muſt be ſo certain as to be ſubſtantial: for if an action be brought by him in reverſion, for refuſing to let him come upon the ground to ſee waſte, and he only ſay that he obſtructed him, and do not ſhew how, a verdict will not help it.

AGAIN, It is "*penitus recuſavit.*"—Indeed, if it were a thing that lies in demand, as a *rent-ſeck*, there demand and ſaying *recuſavit* is enough; but here he ſays *he refuſed his vote.* What then? If he gave it, it is nevertheleſs a vote for the officer's refuſing it; and if there were room * to controvert it, it would have been looked upon as much a vote as if it had not been refuſed.

* [50]

Then this right of voting has no profit in it, and it is as criminal to take money for it as to ſell a preſentation, as far as I can ſee; yet there were no damages in *quare impedit* at common law; therefore why here? And if ſo, no action ought to be.

The multiplicity of actions, which the law will never ſuffer but upon failure of other remedy, and that is the reaſon of *the Caſe of the Common Watering-Place in Southwark*, becauſe there was no other

Ashby against White.

other remedy; but if an indictment would have lain, no action could have been maintained there; but here is another remedy: and he agreed, the case of *Hemming v. Finch*, that an action will lie for refusing a freeman his vote in chusing a mayor, but there the party has no other remedy: besides, this would be a great discouragement to sober, discreet men to meddle with these offices, and the difficulty of elections, and right of voting, in some corporations is very great. So being an action of the first impression, attended with many inconveniences, and the right determinable elsewhere, I am against the plaintiff: But after right determined in parliament, for the trouble and charge the party is at in prosecuting his right, an action may lie.

Holt, *Chief Justice*. The case is truly opened and stated; and the only question is, Whether or not, if a burgess of a borough, that has an undoubted right to give his vote for the chusing a burgess of parliament for that borough, be refused and obstructed from giving his vote; whether, I say, he has any remedy in the king's courts for this wrong against the wrong-doer? All my brothers agree, that he has no remedy; but they differ in their reasons. I cannot agree with them, for I think the action well maintainable. And First, I shall consider the reasons given by my Brothers. The first reason given by my Brother Gould is, that this officer is a judge of the matter, and therefore no action lies against him: but Brother Powys does not wholly concur with him in that; he says, he is only *quasi* a judge: but Brother Powell thoroughly explodes that reason, and says, he is neither a judge, nor any thing like a judge. And certainly he is in the right of it, for he is nothing like a judge; for, What has he to do as judge? The sheriff receives the writ, and is commanded to execute it, and thereupon he makes a precept to the officer of the borough by virtue of the writ; and, What has he to do but to call the town together, and give them notice to come and make their election, and then to receive their votes and cast them up, and return him chose that has the majority? And all this is purely *ministerial*. But the method I shall observe in maintaining my opinion is.—First, To shew that the plaintiff has a right and
*[51] privilege to give his vote.—*Secondly, That in necessary legal consequence of this right, if he be hindered or obstructed in the exercise or enjoyment of it, the law gives him an action. And Thirdly, That this is the proper action the law gives him to vindicate his right, and recover damages for the injury done. I did not think it difficult to prove that he has *a right*; but it may be necessary to shew that he has a right *vested* in him to maintain this action. It is not doubted but that the commons of England have a considerable property in the estates of the land; and that for that reason they have a great part of the legislative authority, without whose consent no new law can be made, no old one abrogated, or taxes given: but because the vast number of which the community is made renders it impracticable for them

all

all to exer: this right, therefore, by the conſtitution of the land, they are to ſend particular members choſen by and from themſelves to parliament, who, when they are choſe, have the full power and authority of thoſe that ſent them; that is, KNIGHTS *for ſhires*, CITIZENS *for cities*, and BURGESSES *for boroughs*: theſe are the three ſorts of perſons qualified to have this great truſt repoſed in them. FIRST, As to *knights of ſhires*, the election of them belongs to the freeholders of the county; and this is an original right veſted in them, and inſeparably incident to their freehold; and a freeholder cannot be deprived of this right no more than of his freehold. Before the ſtatute of 8. *Hen.* 6. c. 7. any man that had a freehold of ever ſo ſmall a value had a power to give his vote at the election of a knight of the ſhire; and that ſtatute recites the miſchief thereof, and confines that power to a freehold of forty ſhillings *per annum*: yet though it be confined to that value, and inferior freeholders excluded, ſtill it remains an original right to the freehold of thoſe that have a right of voting, or that have a freehold above forty ſhillings or of that value *per annum*. The SECOND SORT is of *citizens*, and *burgeſſes*: I put them together, becauſe they both are upon the ſame foundation, and no difference between them, but only that *a citizen* is of greater dignity; in all other things they agree. Now there are two ſorts of *boroughs*: THE FIRST, where the electors give their votes in reſpect of their burgages: THE SECOND, where they give them as members of the corporation. The FIRST SORT, that vote by reaſon of their burgages, do it as freeholders of houſes within the borough by burgage-tenure of the lord of the borough, which is a very ancient tenure, and holds place in the moſt ancient towns in *England*, that ſend burgeſſes to parliament, and the right of chuſing burgeſſes to parliament is incident to every tenant in burgage; *vid. Litt.* 162. ſo that it is * part of their conſtitution, whether incorporated or not; and the borough in queſtion is a borough not incorporated, and therefore this right is upon account of their *inhabitancy*, and not part of their *tenure*, but a privilege annexed to their burgage-lands, and is a real right belonging to their eſtate. THE OTHER SORT is, when there is A CORPORATION by *charter* or *preſcription*, that corporation by conſequence chuſes and ſends members to parliament; and whereas this right, in thoſe that hold by burgage-tenure, is a real intereſt annexed to their eſtate and inheritance, in thoſe that do it as freemen of a corporation either by charter or preſcription, it is a perſonal privilege, the inheritance whereof they have by their charter or by preſcription in ſuch manner as the charter or the preſcription directs; which right and inheritance is lodged, in point of right, in the whole body politic, though the exerciſe and poſſeſſion be in particular members purſuant to the ſpecial directions and limitations of the charter, or the uſage of the preſcription. If the corporation be begun within time of memory, it muſt be by grant; and he quoted the caſe of the town of *Dungannon* in *Ireland* (*a*). The town

* [52]

(*a*) 12. Co. 120. Hob. 15.

ASHBY *against* WHITE.

was incorporated by the name of "Provoſt, Free Burgeſſes, and "Commonalty, &c." *et ulterius*, that the ſaid provoſt and free burgeſſes ſhould chuſe parliament-men; and it was held on debate, that the laſt clauſe veſted the ſaid privilege in point of intereſt in the CORPORATION, but confined the exerciſe to *the provoſt* and *burgeſſes*: ſo let the exerciſe be according to the charter or the preſcription, either in ſome particular members or in all, ſtill the right and intereſt is in the whole corporation: I ſay, that this is a diſtinct and particular right *veſted* in every member of the body politic, though the exerciſe be in a particular number; for if we but conſider the matter ſeriouſly, it is they whoſe perſons, eſtates, and liberties, are put in the power of the choſen member, that ought to have the right of voting for, and chuſing ſuch member, veſted in them, and it is not *quatenus* they are a corporation that they can give this power to bind their property, but it is as they are particular, private, natural perſons: as in *London*, the body politic does not pretend to the right, but it is in all the natural members that compoſe the corporation, though exerciſed by a ſelect number: and ſure the FREEMEN OF ENGLAND have too conſiderable an eſtate in this right to have it only lodged in a body politic; and when parliament-men were paid wages, it was paid not by the corporation, but by the whole community. Upon the back of a roll in the reign of *Edward the Third* (*a*), there is a writ directed to the mayor and aldermen of *N.* commanding them to raiſe from the community of the whole town; and abundance of other writs there are in like manner for raiſing the ſalary of parliament-men of the whole community, and not of the corporation; which ſufficiently ſhew that the corporation only is not repreſented, but alſo all the whole community; for none ought to contribute but who is repreſented. * It is no new thing, but agreeable with reaſon and rule of law, for a franchiſe to be of an inheritance in a body politic, and the enjoyment and benefit of it to enure to the town in their private and natural capacity; and this is a caſe of conſtant experience: preſcription in the burgeſſes of *Derby* for common for their cattle, *levant et couchant* (*b*); ſo if it be a burgeſs, he has a diſtinct property and right as ſuch; if a freeman, he votes in his natural capacity, and his perſon, eſtate, and liberty, are bound by it, therefore he has a right in it. I wonder to hear it ſaid, that it is ſo ſmall a right, as an injury offered to it ſhould be unpuniſhable, by the rule of *de minimis non curat lex*. Is it a little thing to have the privilege of giving a vote in the election of a perſon in whoſe power my life, eſtate, and liberty lie, obſtructed (*c*)? It is plain, that the want of this privilege occaſions damages, and the having it prevents it; ſo it is a great privilege

* [53]

1. Bac. Abr. 45.

(*a*) 46. *Edw.* 3. memb. 4.
(*b*) 1 Saund. 343.
(*c*) See the ſtatute 33. and 34. *Hen.* 8. c. . and the ſtatute 25. *Car.* 2. c. 25. concerning *Cheſter* the one, and the other concerning *Durham*: AND NOTE the words "*Privileges*" and "*Liberties*" in them. NOTE *to the former edition.*

to

to vote for a parliament-man; and ſure every one that has that great privilege has a right in it; and if ſo, of neceſſary conſequence he has an action to vindicate and maintain that right.

ASHBY *againſt* WHITE.

SECONDLY, It is a vain thing to imagine that there ſhould be right without a remedy; want of right and want of remedy are *termini convertibiles:* A man buys the inheritance of an advowſon (*a*), and upon the next avoidance there is an uſurpation, if there be no *quare impedit* within ſix months, he has loſt his right becauſe he has loſt his remedy; for ſuppoſe upon the next avoidance he ſhould preſent by uſurpation, and die ſeiſed, his heir could not be remitted; ſo it is without a precedent to have a right without a remedy: one indeed may have both right and remedy, and loſe his remedy, and by conſequence his right. Would it not look ſtrange to any man who has heard of our Conſtitution, that the COMMONS OF ENGLAND ſhould have a ſhare in the Legiſlature by members eligible by themſelves, and that it ſhould lie in the power of a ſheriff or other officer to deprive any of them of ſo tranſcendent a right, and he to be without remedy by the law of *England?* Taking it then that the plaintiff has a right, it is moſt apparent on the record that this officer did exclude him from the enjoyment thereof. And in ſo doing he did well or ill; none will ſay that he has done well; then he has done the plaintiff wrong in ſo barring him of his right; and it is not at all material whether the candidate, that he would have voted for, were choſen or likely to be, for the plaintiff had a right to vote, and being hindered of that he has a wrong done him, for which he ought to have a remedy. If an act of parliament be made for the benefit of any perſon, and he is hindered by another of that benefit, by neceſſary conſequence of law he ſhall have an action (*b*); and the current of all the books * is ſo. How comes an action of *ſcandalum magnatum?* The ſtatute gives none; it was made for public peace; but being for the benefit of *great men*, of conſequence an action lay for them; and that is the reaſon why a writ of error lies not in THE EXCHEQUER CHAMBER in an action of *ſcandal. magnatum*, becauſe it is not any of the cauſes mentioned, but an action founded upon the ſtatute. Now, if this be ſo in caſe of an act of parliament, why ſhall not common law be ſo too? For ſure the common law is as forcible as any act of parliament: and the common law is, that a freeholder ſhall vote in chooſing knights, &c. and if you have a right by law ſo to do, ſhall not that law give him an action againſt him that bars him of that right? By the ſtatute of *Weſtminſter the Firſt, cap.* 21. all elections ought to be free; the words are general, "all elections." Now then when this act, which indeed is but an inforcement of the common law, takes this matter to be of ſo great conſequence as to declare it, and give a new authority and ſanction to it, ſure it is a very bold ſtroke to ſay, that when a man is hindered in his election he has no remedy; and it cannot be leſs than a violation, and an oppoſition to that ſtatute, to ſay, that he has no remedy, after that the ſtatute has ſo manifeſtly interpoſed in it.

2. Inſt. 39. 3. Cro. 133, 134. that it muſt be *tam pro domino rege quam pro ſeipſo.*

* [54]

1. Vent. 34. 49. Hob. 43. 1. Cro. 142. 1. Jo. 194. 1. Cro. 535.

(*a*) See Bredeman's Caſe, 6. Co. 58. (*b*) 12. Co. 100. 2. Inſt. 118.

Athey *againſt* White.

THIRDLY, That this is his remedy: My BROTHER GOULD ſays, and all my brothers agree with him, that he has no hurt done him; but I think it impoſſible that there ſhould be an injury without damage: injury in its nature imports damage, though it coſt not the party injured a farthing; for damages do not conſiſt in things pecuniary, but in a diſturbance of right. If words be ſpoken of a man whoſe reputation is ſo very intire that nobody believes the words, ſo that he loſes nothing by them, yet becauſe it is an injury to a man to be ill ſpoken of, he ſhall recover damages. Suppoſe one give another a cuff on the ear, but do not hurt him, yet for the indignity offered to his perſon an action lies. So if another ride in a path-way in my land, I may have an action, becauſe it is an invaſion of my property, and an injury to my right; and here the wrong being not *vi et armis*, ſo as to maintain treſpaſs generally, the law in that caſe gives this remedy. If a man has return and execution of writs, and another enters and executes a writ within his franchiſe, he ſhall have action upon his caſe for the invaſion upon the right; *à pari* here, for the party had a right, and the defendant diſturbed him in the enjoyment of it.

Dyer, 26.

But it is objected, that here will be a multiplication of actions. I anſwer, So there ought; for if one will multiply injuries, it is fit the actions for the ſame ſhould be multiplied: as if in this caſe the defendant had taken upon himſelf to refuſe forty votes, why ſhould he not be liable to as many actions? For if he had beat forty men, every one of them would have an action againſt him, for every man's damage is diſtinct from the others. If many men are injured by one particular act, there the wrong-doer ſhall be puniſhed by way of indictment, becauſe actions ſhall not be multiplied; but if there be but one man * offended by that particular act, or a more ſpecial manner than others, he ſhall have his action; and if he injure a third perſon by another particular act, he ſhall have his action, *et ſic in infinitum*. If there be a common, and one hundred commoners thereof, and one perſon dig a pit there, for that one pit every one of the hundred ſhall have his action, becauſe of their ſeveral rights; but if a pit be dug in a highway, then it would be a common public nuſance; and that is the true reaſon of *Williams's Caſe* (*a*): And of the caſe of *Turner v. Sterling* (*b*), there he was not elected; for it could not appear who had the majority, he or his competitor; there he could not give his loſs of place in evidence for damage, becauſe he was not elected: but the cauſe of complaint was, that it being difficult on the view to gueſs who was choſe, he had a right to demand a poll, and the denial of that was an injury to his right, for which the action was held maintainable. And he quoted *Dowman's Caſe* (*c*): If a man make a leaſe, the law gives him leave, when he thinks fit, to come and ſee if there be waſte; and if he come to ſee, and the leſſee hinder him, although it do not appear what the damage was, or that any waſte was committed, yet he ſhall have his action, becauſe he had a right, in the enjoyment whereof he was diſturbed.

* [55]

2 Lev. 50. Poſt. 100. Ante, 48. 1. Vent 206. 2. Vent. 25. 3 Keb. 26. 32.

(*a*)
(*b*) 2. Lev. 50. 1. Vent. 206. 2. Vent. 25.
(*c*) 2. Roll. Rep. 19. S. C. Cro. Jac. 478.

My

MY BROTHERS ſay, "Oh! alas, here is a remedy in parliament; "we muſt be very tender, for the matter is nice, and the parliament "may judge this a different way."—I anſwer, that as this caſe is, they cannot go to parliament; for it is agreed, that thoſe againſt whom he would have voted were elected, and his grievance here is, that he is not repreſented; for if a man be not allowed to give his vote, he is not repreſented; if he be allowed his vote, and the majority is againſt him, his vote is included in the majority; and the encouraging of remedies for injuries is the moſt effectual way to make theſe officers honeſt and obſervant of the conſtitutions of their cities and boroughs; and they would decline ſuch practices as we daily ſee them guilty of. But it relates to parliament: What then? It is a matter that wholly depends on charter or on preſcription, and they ſure are things of which the queen's courts have conuſance; and to judge of them is not to enlarge their juriſdiction; and if this be matter within our juriſdiction, we are upon our oaths bound to maintain it, more eſpecially when they cannot go to parliament. If a freeman of a borough had applied to THE HOUSE OF COMMONS, for that he was denied his vote, they would have ſent him to take his courſe at law. As to the authority of my *Lord Hobart* (*a*), it is true, my *Lord Hobart* is of that opinion, and it is a very fine one; but how it would hold on debate may be doubtful. There was indeed no damage in a *quare impedit* at common law, but the ſtatute gives it againſt the diſturber; and if the plaintiff in a *quare impedit* do not make the biſhop a diſturber, he is barred of the benefit of the ſtatute: * but let that be how it will, it is not like this, becauſe, as this caſe is, they can have no recourſe to parliament to aſcertain the right. As to the ſaying of *Littleton*, that ſuch an action was never brought, and that therefore it lies not, it is true, *non-uſer* is a good argument where it is ſupported with reaſon, otherwiſe not; this ſaying was upon the *ſtatute of Merton*, *cap.* 7.; the ſtatute ſays, "that if a lord by "knight ſervice married the heir under fourteen, where he was "diſparaged, *ſi parentes conquerantur*;" and the queſtion was, What was meant by *conquerantur*, whether it muſt be a complaint in a judicial manner? and it was agreed, that "*conquerantur*" was the ſame as if he had *cauſe of complaint*; and that, as a more ſevere conſtruction againſt the lord, if he ſhould be ſo unjuſt as to diſparage his ward, he ſhould loſe him; and that in conſequence muſt have been by an entry upon the lord; and that if they were diſturbed, they ſhould have an ejectment of ward, becauſe the law gave them the cuſtody: ſo, in that caſe, the argument is grounded on reaſon, from the very words of the ſtatute, and the conſtant conſtruction thereupon; and to carry it generally farther, and to extend it to all new caſes, would deſtroy many late authorities; as the caſe of *Hunt v. Dowman* (*b*), in the ſixteenth year of *James the Firſt*, for hindering a leſſor to ſee if waſte were committed, which was the firſt of the kind; as was alſo the caſe of *Turner v. Sterling*.—Let us conſider wherein the law conſiſts; not in par-

* [56]

(*a*) Hob. 318. (*b*) Cro. Jac. 478. 2. Roll. Rep. 19.

 ticular

ABBEY *againſt* WHITE.

ticular inſtances, but in the reaſon that rules them; *Ubi eadem ratio, ibi idem jus.* And if where one is injured in one ſort of right he has a good action, why ſhall he not have it in another? Or how does this differ from other caſes? For though THE HOUSE OF COMMONS have a right to determine elections, yet they cannot judge of the charter originally, but ſecondarily, or as incident to the determination of the election; and therefore where an election does not come in debate, as it does not in this caſe, they have nothing to do: and we are to exert and vindicate the queen's juriſdiction, and not to be frightened becauſe it may come in queſtion in parliament; and I know nothing to hinder us from judging of matters depending on charter or preſcription. The caſe of *Morſe v. Slew* (*a*) was the firſt of the kind: and the caſe of *Smith v Crawſhaw* (*b*), an action for malicious indicting for treaſon. And he quoted a caſe of *Bodily v. Lawne* (*c*), in the LORD BRIDGMAN's time; for there an action was held maintainable for a man againſt ſome that had made *a riding* for him and his wife; the wife, it ſeems, having been uſed to henpeck her huſband.—And he concluded for the plaintiff.

Vide ante, 48.
1. Vent. 206.
2. Vent. 25.
1. Mod. 85.
2. Lev. 69.
2. Keb. 866.
3. Keb. 72. 112. 135.
3. Keb. 578.

NOTE, A *writ of error* was brought of this judgment before the lords, and THE JUDGMENT *reverſed.*

(*a*) 23. *Car.* 1. 1. Vent. 190. 238. (*c*) 15. *Car.* 2.
(*b*) W. Jones, 93.

*[57]

Caſe 66.

*The Caſe of Sutton, Marſhal of the Court.

A leaſe of the office of marſhal of the king's bench for years, determinable on leſſee's death, is good.

SUTTON, *the Marſhal*, having not attended for two Terms, and a new marſhal being preſented to the Court to be ſworn in, he produced a leaſe from the patentees of the office for a certain number of years, determinable on his death,

And it was held PER CURIAM, that albeit a leaſe for years abſolutely of this office is void, yet a leaſe of it for years determinable upon the life of the leſſee is good; for the danger of the office going to executors or adminiſtrators is avoided; and that is the ſole reaſon why the office is not abſolutely grantable for years (*a*).

S. C. poſt. 91.
S. C. 12. Mod. 557.
S. C. Ld. Ray. 1005.
Hob. 153.
1. Salk. 2. Ld. Ray. 159. 163. 853. 1038. 1243.

New marſhal ſworn upon his knees.

THE COURT ſaid, that they would ſwear this man in, without meddling with the poſſeſſion, and leave that to the determination of the law in the ordinary courſe.

And he took his oath upon his knees.

(*a*) See the ſtatutes 8. & 9. *Will.* 3 c. 27. and 27. *Geo.* 2. c. 17.

The

The Queen *againſt* George.

Caſe 67.

IT WAS AGREED, that the clauſe in the ſtatute of 4. & 5. *Will. & Mary*, c. 23. againſt deſtroying the game, *viz.* "That in caſe "any hare, partridge, pheaſant, pigeon, fiſh, fowl, or other game, "ſhall, upon ſuch ſearch or otherwiſe, be found, the offender ſhall "be carried before ſome juſtice of peace of the ſame county, "riding, or diviſion; and if ſuch perſon do not give a good "account how he came by ſuch hare, partridge, pheaſant, "pigeon, fiſh, fowl, or other game, ſuch as ſhall ſatisfy the ſaid "juſtice, or elſe ſhall not in ſome convenient time, to be ſet by "the ſaid juſtice, produce the party of whom he bought the ſame, "or ſome other credible perſon, to depoſe upon oath ſuch ſale "thereof, that then ſuch perſon not giving ſuch good account, "nor producing any ſuch witneſs as aforeſaid, ſhall be convicted "by the ſaid juſtice of ſuch offence, and upon ſuch conviction "ſhall forfeit for every hare, &c. *(a)*" ſhall be underſtood, *upon proof made*, that it was *found upon him*;—otherwiſe that there could be no conviction.

A perſon cannot be convicted without proof. S. C. ante, 40. 10. Mod. 26. Comy. 274. 522. 576. Ld. Ray. 1220. 1368. 1478. Stra. 496. 711. 1098.

(*a*) See 9. *Anne*, c. 25. and 28. *Geo.* 2. c. 12.

Memorandum.

Caſe 68.

IT was ſaid by POWYS, *Serjeant*, in chancery, that if a biſhop make a leaſe for twenty-one years, and the leſſee create *a truſt* thereupon, and after the biſhop die, and his ſucceſſor, ſuppoſe for a fine, renews the leaſe, though not compellable to do it, and though there be no truſt of the ſecond leaſe, yet equity ſhall ſubject it to the former truſt.

Biſhop's leaſe renewed, ſubjected to a former truſt. Abr. Eq. 272, 273. 326. Gilb. Eq. Rep. 77. Prec. Chan. 319. 3. Peer. Wms. 101.

Leſauld *againſt* Dyer.

Caſe 69.

BY THE COURT and all THE CLERKS. The meaning of the rule, that "after a cauſe has ſlept four Terms after iſſue joined, "there muſt be a Term's notice of trial," is, that there ſhall be ſome actual proceeding within the four Terms; for a proceeding actually out of the four Terms, though, by acceptation of law, it may be within the four Terms, is not enough: as if a *venire facias* be taken out in the Vacation after the fourth Term, teſted, as it muſt be, in Term, ſo that in conſideration of law it is of that Term; yet becauſe in fact it was after, it is no ſuch proceeding as to bring the party out of the neceſſity of giving a Term's notice.

The rule, that a Term's notice of trial after a cauſe has ſlept four Terms, explained. S. C. 2. Salk. 457. 650. Ante, 18. 5 Com. Dig. "Pleader" (R. 17.).

* GOULD, *Juſtice*, cited the caſe of *Cow v. Hare*, in *Eaſter Term*, in the tenth year of *William the Third*, that if the cauſe had any agitation within the four Terms, as ſtriking a jury, or any motion in the cauſe, it would be a ſufficient proceeding.

* [58]

LEGAULD *against* DYER.

And PER OMNES CLERICOS, notice any time, *ſedente Cur.* within the laſt day of the laſt of four Terms, is ſufficient; for that ſhews the matter has not ſlept four whole Terms, and the Term of which the iſſue is joined is to be taken excluſively; for the rule is, that proceeding be within four Terms after iſſue joined: So that if iſſue be joined in *Trinity Term*, and there is any proceeding or notice before the end of next *Trinity Term*, it will be enough.

And here it appeared by the indorſement on the back of the *venire facias* that it was taken out in Vacation. And for want of compliance with the rule the verdict was ſet aſide.

Caſe 70. The Queen *againſt* Hoſkin.

"Servant to "*J. S.*" is a good addition.

S. C. Holt, 41. 8. Mod. 51. Stra. 556. 816. Ld. Ray. 264. 849. 1179.

A SERVANT was indicted for a treſpaſs committed by him by the command of his *maſter*, by the name of "*A. B.* ſervant "to *J. S.*"

Exception was taken, that there was no addition; "ſervant" being not good.

But by HOLT, *Chief Juſtice*, "ſervant to *J. S.*" is a good addition, and as certain as "gentleman *(a)*."

Exception to the caption in ſame Term.

And he ſaid, there could be no other exception to the caption the ſame Term it comes in.

And no more was done.

(*a*) See Year-Books 2. *Hen.* 6. pl. 31. 9. *Edw.* 4. pl. 48. 2. *Hen.* 4 pl. 7.; the 21. *Edw.* 4. pl. 71.; and Bro. Abr. "Additions," 56. 58. *accord.*—But ſee 2. Hawk. P. C. c. 23. ſ. 112. *contra.*

Caſe 71. Claxton *againſt* Baſty.

Pleas in bar need only be certain to a *common intent.* Poſt. 156.

THE ſtatute 8. & 9. *Will.* 3. c. 18. of Compoſition of two-thirds was pleaded in bar, and it was averred, that the defendant had abſconded at ſuch a time before the ſtatute; but it was not ſaid, that he had abſconded, or was in jail at the time mentioned in the ſtatute.

S. C. Ld. Ray. 967. Com. Rep. 112. Ld. Ray. 324. 382. 390. 763. 1536.

THE EXCEPTION taken was, that for aught appeared in this plea the defendant was ſolvent at the time of the ſtatute, and therefore not capable of the benefit thereof.

But PER CURIAM, This being *a bar* ſhall be good to a *common intent*; and if the defendant became ſolvent after the failure, it ought to come on the plaintiff's ſide by replication.

A *profert* not neceſſary in pleading *a writing*, though under *ſeal*, unleſs delivered as *a deed.* 5 Com. Dig. "Pleader" (2. G. 6.).

SECOND EXCEPTION. That the defendant pleaded the compoſition as a writing under hand and ſeal; and therefore *a deed*, and by conſequence to be produced with a *profert.*

But PER CURIAM, He only pleads it *ſigned* and *ſealed*, but not to have been *delivered* as a deed muſt have been: and the

ſtatute

ſtatute does not require delivery, and therefore there is no neceſſity of a *profert*.

CLAXTON *againſt* BASTY.

THIRD EXCEPTION. It is pleaded to have been made the twelfth of *February*, after the ſtatute; ſo it may have included debts becoming due after the ſtatute.

A plea of *compoſition* ſhall only be underſtood of debts within the ſtatute.

But PER CURIAM, It ſhall only be a compoſition for the debts underſtood by the ſtatute, at leaſt as to the non-ſubſcribers, though it may be otherwiſe to ſubſcribers.

And judgment *niſi* was given for the defendant.

* Lord Mohun's Caſe.

Caſe 72.

CHARLES GERRARD, ſon to the *Lord Brandon Gerrard*, was attainted of HIGH TREASON in the ſecond year of *King James the Second*, for treaſon committed againſt *King Charles the Second*, and obtained his pardon, and leave to reverſe his attainder.

If a *father* bring a writ of error to reverſe the attainder of his *ſon*, and, on the confeſſion of the attorney general, a rule for its reverſal be obtained, the Court, though in the reign of a ſubſequent king, will order the record of the reverſal to be made up after the death of the parties; but the writ of error, and the aſſignment of error thereon, muſt be produced.

Accordingly he brought *a writ of error*, and aſſigned error, which the then ATTORNEY GENERAL confeſſed, and obtained a rule, upon his own motion, for reverſal of the attainder; but the record of the reverſal was never made up.

The *Lord Brandon Gerrard* died, and *Charles Gerrard* ſucceeded him in honour and eſtate, and ſat many years in THE HOUSE OF LORDS, before the death of his father, and after the reverſal in THE HOUSE OF COMMONS, as a perſon duly qualified. He was afterwards by *King William* made *Lord Macclesfield*; and by his will deviſed his eſtate to my *Lord Mohun*, and made him his executor, though he had ſeveral daughters that were heirs at law.

Upon this the daughters, finding that there was no ROLL of the reverſal of the attainder, ſuggeſted that matter by PETITION to the queen, and implored her grace. The queen referred the matter to the examination of the attorney general and ſolicitor: whereupon MR. SOLICITOR, in the *Trinity Term* before, moved for a rule for ſtaying of all things as they were until the Court was further moved, and had ſuch a rule.

3. Chan. Rep. 102.

It was NOW moved for my *Lord Mohun*, that he might make up the record.

And, it appearing upon examination that there was no writ of error, or aſſignment of error, that his Counſel would own or produce,

5. Com. Dig. "Pleader" (M. 4.).

THE COURT unanimouſly declared, that the firſt rule was a very reaſonable good rule, and chid ſome of the Counſel that called it an extraordinary one. They ſaid, they would ever make ſuch a rule upon the like occaſion; and that it is frequently done between party and party; that if there be a rule for a judgment, and it is not entered for many years, if the Court be informed of it, they will not let them enter it until the matter be examined how it came not to be entered before.

SECONDLY,

LORD MOHUN'S CASE.

SECONDLY, They ſaid, they would ſupply the neglect or defect of their officer, that ſubjects ſhould not ſuffer by it, and therefore would give leave to make up THE ROLL now.

Vide poſt. 191.

THIRDLY, That they could not make up a record of a reverſal of an attainder without a warrant, viz. *Firſt*, A writ of error; *Secondly*, An aſſignment of error: for the writ of error being brought in the king's bench, *viz.* the ſame court where the attainder was, no error could be aſſigned there but error in fact; and it may be the errors aſſigned were errors in law; and this ought to appear to us, that we may not order a wrong record to be made up.

Vide. 2. Lev. 38.

And at another day, perceiving THE COURT would not ſuffer THE ROLL to be made up without *a writ of error*, they produced a writ, which was of a judgment of attainder for treaſon committed in *King James the Second's* time, whereas it ſhould have been, as the truth was, in *King Charles the Second's* time: and the errors aſſigned were * both in fact and in law: in fact, that two of the jury never appeared: in law, that the *venire facias* was *qui tam*, whereas it was in the king's caſe.

* [60]

And now they moved for leave to make an entry.

NORTHEY, *Attorney General, contra.* It appears that their writ of error is not to reverſe this attainder, and therefore you will not now ſuffer them to enter up a judgment of reverſal, when it appears that the writ, which is the foundation, is wrong, and cannot be an authority to reverſe the attainder, for it is not *ad idem.* If judgment be entered now, it becomes your judgment; and therefore you ought to examine the foundation of it, and not give order for the entering of a judgment only to put the matter in brangle. Beſides, when there is a rule for judgment, and that is not entered for ſome time, you take care for the ſafety of purchaſors, to have it entered of that time that it is really given of. And by the act of the *Civil Liſt*, this eſtate is unalienably fixed in the queen, and would by the relation of this entry be deveſted out of her.

THE COURT. The whole queſtion will be, Whether we ſhall now command our officer to do that which he ought to have done long before? It is ſaid, that in the caſe of a *common recovery*, after the death of the parties, the right *original* not having been filed, but found in the attorney's ſtudy, was ordered to be entered up; and as to the matter of purchaſors, there are, in all probability, many in this caſe under my *Lord Macclesfield*, which it would be hard to defeat.

The doubt at laſt came to be, Whether they would leave my *Lord Mohun* looſe of the rule, to do what he could according to law, or hold him to particular directions from the Court? for the Court ſaid, that if he ſhould make any entry but what ſhould be well warranted, the Court would puniſh the clerk that ſhould do it, and alſo ſet it aſide.

And

And at laſt IT WAS RULED, that they ſhould make a draught in paper of the record that they would make up, and attend THE JUDGES and MR. ATTORNEY with it. Lord Mohun's Case.

And the writ of error, ſuch as it was, was entered on THE ROLL with a *valeat quantum valere poteſt*, PER CUR.

But THE COURT would not make a rule in it to make it their judgment, but only that their officer ſhould make that entry now which he ſhould have made when the rule was pronounced.

Burridge *againſt* Forteſcue. Caſe 73.

PER CURIAM. In debt upon a judgment the Court will not ſtay proceedings on motion upon payment of principal, intereſt, and coſts, as they will upon debt on bond; and in that caſe it is an equitable motion to be relieved againſt the penalty; and therefore whatever coſts the plaintiff has been in any wiſe put to, ſhall be allowed him (*a*). Of ſtaying proceedings upon payment of principal, &c.

(*a*) See the Queen v. Foxley, ante, 11.; Butler v. Rolfe, ante, 25.; Le Sage v. Pere, 7. Mod. 114.; Anonymous, 7. Mod. 140.; and the ſtatute 4. & 5. *Anne*, c. 16.

* Evans *againſt* Roberts. Caſe 74.

A WRIT OF ERROR on a judgment upon a bond, before the ſheriff and bailiff of *Briſtol*, in a court held before them, "*ſecundum legem mercatoriam, ſecundum conſuetudinem civitatis* "*præd. tempore cujus, &c.*" If a declaration in an inferior court alledge it to be a court *ſecundum legem mercatoriam*, without ſhewing it *curiæ ſtapulæ*, it ſhall be intended a common inferior court.

EYRE excepted,

FIRST, That there is no court held *per legem mercatoriam* before the ſheriff, for that muſt be only held before the mayor of the ſtaple, and in matters only concerning *ſtaple* tranſactions.

But PER CURIAM, It being laid to be *ſecundum conſuetudinem civitatis*, it will be well enough, like the caſe of *Hodges v. Serwin* (*a*), where a court of pypowders, which only is intended of courts for fairs and markets during the fair or market, and for matters there ariſing, is ſaid to be held at *Glouceſter*, *ſecundum conſuetudinem civit. præd.* and action for a hundred pounds therein; and held good, becauſe of *conſuetud. &c.* (*b*); for it being laid to be an ancient court, it ſhall be intended a common inferior court, for common matters conuſable there. S. C. 3. Salk. 146. 12. Mod. 598. Ld. Ray. 1543. 1. Salk. 265. 5. Com. Dig. "Pleader" (3. B. 13.).

THE SECOND EXCEPTION was to the writ, for it was to remove *recordum loquelæ quæ coram vobis reſidet*, and it appears that the record removed was before his predeceſſor. A writ of error denied to the judge of an inferior court, to remove a record *coram vobis*, without naming him, is good, although the record was before his predeceſſor.

(*a*) Cro. Car. 46.
(*b*) Vide Saund. 87. 311.
(*c*) 1. Sid. 64. 1. Keb. 165. 187.

And

EVANS *againſt* ROBERTS.

And THE COURT ſaid, that the writ being directed to the ſheriff, without naming him, it is well enough; and if a writ be directed to the ſheriff of *B.* and before its return another ſheriff is choſe, he ought to return and execute the writ; and the difference is when it is directed to him by name, and when by the name of his office generally; and this is not like a writ of error from the common pleas, for that is always to THE CHIEF JUSTICE by his name *(a)*, if there be a Chief Juſtice, or to the others by name, and therefore muſt not vary.

Return to a writ of error.

6. Com. Dig. "Retorn" (D. 4.).

NOTE, Here the anſwer to the writ of error was, that there came another writ of error to them before that writ, bearing the ſame *teſte* and return, and recited the writ, and made a return to it; and held good.

And the judgment was affirmed.

(*a*) 1. Sid. 64. 1. Keb. 165. 187.

Caſe 75.

The Queen *againſt* Dixon.

A *certiorari* to remove an indictment for a misdemeanor from the quarter ſeſſions, taken out before, but not ſerved till after conviction, ſhall be quaſhed.

S. C. 1. Salk. 150.
S. C. 3. Salk. 78.
S. C. 2. Ld. Ray. 971.
Ante, 27. 42.
Poſt. 105. 311.
1. Salk. 379.
Ld. Ray. 1118.

DIXON was indicted for ſelling five yards of muſlin, and affirming it to be worth four ſhillings a-yard, when in fact it was really worth but two ſhillings and ſixpence a-yard.

A writ of *certiorari* was brought to remove it, but not ſerved till after conviction.

And though THE COURT had no opinion of the indictment *(a)*, yet they ſaid they did not like *certiorari's* after verdict, and that whenever one removes an indictment on which there is a conviction *(b)*, the *certiorari* ought to give day above, which was not done here, therefore it was altogether irregular, and that by this *certiorari* they could by no means remove the indictment; for if one take out a *certiorari* to remove an indictment, and will not uſe it until after conviction, or the jury be ſworn, he loſes the benefit of it.

* [62]

Vide ante, 27. 33. 40. 43.
Poſt. 83.

* And for that the writ was quaſhed, and a new one granted to remove the indictment and conviction thereupon, and ordered them to make it ſpecial, and give the proſecutor day thereupon above.

(*a*) See the Queen *v.* Orbel, ante, 42.; Anonymous, poſt. 105.; the Queen *v.* Hannon, poſt. 311.—By 33. *Hen.* 8. c. 1. to obtain money, &c. by means of a *falſe privy token*, or, by 30. *Geo.* 2. c. 24. by means of *falſe pretences*, is made an indictable offence; but, by this laſt ſtatute, the *certiorari* to remove indictments founded thereon is expreſsly taken away, Rex *v.* Smith, Cowp. 24.; Rex *v.* Young, 2. Term Rep. 472.

(*b*) But ſee Rex *v.* Nicolls, that an indictment cannot be removed from ſeſſions after verdict and before judgment; and that if a *certiorari* have been obtained for that purpoſe it ſhall be quaſhed, 2. Stra. 1227.

Mills *againſt* Wilkins.

Caſe 76.

Hilary Term, 13. *Will.* 3. *Roll* .

AND

Michaelmas Term, 2. *Anne*, *Roll* .

The miſ-recital of the *title* of a ſtatute is immaterial; for the title is no part of the ſtatute.

TRESPASS for taking ſeveral ſkins from the plaintiff. The defendant juſtified as an officer by virtue of the ſtatute of 1. *Jac.* 1. c. 22. for well tanning of leather, ſetting forth the title thereof variant from the record; and averred, that the ſkins were not dreſſed according to the intent and meaning of the ſtatute, without ſhewing any particular defect.

S. C. 2. Salk. 609.
S. C. 3. Salk. 331.
S. C. Holt, 662.
Hob. 310.
11. Co. 33.
Hut. 56.
4 Inſt. 345.
Ld. Ray. 77. 120. 343. 382.
2. Vern. 58.
1. Peer. Wms. 317.
3. Peer. Wms. 434.
2. Hawk. P. C. ch. 25. ſ. 105.

Two exceptions were taken to the plea:

FIRST, That there is no ſuch act intitled as they ſet forth; and though it be unneceſſary for them to ſet forth the title of the act, or to recite it particularly, yet ſince they have taken upon themſelves to do it, they muſt do it truly at their peril; for by their particular deſcription of the act they tie up their juſtification to the ſtatute they deſcribe (*a*).

To this exception it was offered for anſwer, that the title is no part of the act, and that an act may be without any title at all, as moſt of the ancient acts are; and therefore a variance in the title is nothing; and for this was quoted the ſaying of my LORD HALE, in *Hardres* (*b*), and an opinion of the whole Court in common pleas, in the caſe of *Chance v. Adams* (*c*), grounded upon that of HALE.

HOLT, *Chief Juſtice*. It is true, the title of an act of parliament is no part of the law or enacting part, no more than the title of a book is part of the book; for the title is not the law, but the name or deſcription given to it by the makers: juſt as the preamble of a ſtatute is no part thereof, but contains generally the motives or inducements thereof; and therefore it is not neceſſary to ſet forth the title or preamble, but generally "that at a parliament ſeſſions "held ſuch a time, &c. *it was enacted*;" though ſome have been ſo over-cautious, as not only to ſet forth the title of the act, but alſo to do it in *Engliſh*: but ſure that is too much caution; and the true way to ſet it out, if at all, is in *Latin* (*d*); and by ſetting out the title ſpecially, you tie your juſtification to an act ſo entitled, and if you cannot produce one you are gone: and he ſaid, the ſaying of HALE was ſudden (if at all), and notwithſtanding his great veneration for his opinion, he could not agree with him.

*[63]

3. Keb. 641, 642. 648.
Dyer, 324.
Vide poſtea.

GOULD, *Juſtice*, agreed with the Chief Juſtice;

POWELL, *Juſtice*, only declaring, that he had concurred with the reſt in the common pleas ſolely upon the opinion of HALE, reported in *Hardres*.

(*a*) 3. Keb. 641. 648. Cro. Car. 232.
(*b*) Hard. 324. 3. Cro. 86. Staund. 868.
(*c*) Hilary Term, 7. *Will.* 3. Roll 28.

And

Mills *againſt* Wilkins.

And upon this exception the plaintiff had judgment.

A SECOND EXCEPTION taken was, that they did not ſhew wherein the defect was, that the Court might judge whether it were contrary to the act or not.

And to this it was anſwered, that the ſeizure was not as an abſolute forfeiture, but to try the ſufficiency; and it would be hard to put an officer at his peril in ſuch a caſe to know and to ſet forth the defect.

Caſe 77. Cotton *againſt* Martin.

A priſoner for debt, who eſcapes, and is recommitted on 1. *Anne*, c. 6. cannot have *a day rule*; and a perſon in cuſtody at his ſuit ſhall be diſcharged on *oath* that nothing is due. Ante, 21. 37. Poſt. 95. 125. 154. 183. 225. 253.

DEBT UPON A BOND to come to an account.

The plaintiff had been priſoner in THE FLEET, and having eſcaped was taken up by a warrant according to the late act of parliament (*a*), and committed to NEWGATE. And an affidavit being made that nothing was due (*b*), and the plaintiff, by his being in NEWGATE, being diſabled from coming before a Judge to ſhew cauſe of action, and that diſability coming from his own wrong, *viz.* the eſcape;

THE COURT ordered *common bail*: if he had not been eſcaped, he might have got out by *a day-rule*.

(*a*) 1. *Anne*, c. 6.

(*b*) But ſee the caſe of Emerſon *v.* Hawkins and Others, 1. Wilſ. 335. that where a plaintiff has ſworn poſitively that the defendant is indebted to him, in order to hold him to bail, the Court will not receive any affidavit to explain or contradict the plaintiff's oath; and that even an affidavit of the plaintiff's confeſſion that the defendant owes him nothing cannot be received, S. C. Sayer, 54. See alſo 1. Salk. 100. 2. Stra. 1157. 1. Bl. Rep. 192. 1. Burr, 655. 4. Burr. 2017. Dougl. 432. 450. 1. Term Rep. 716. *accord*. But if the plaintiff's affidavit be defective, the Court will diſcharge on common bail, Huſſey *v.* Baſkerville, 2. Wilſ. 225.

Caſe 78. Smartle *againſt* Penhallow.

Trinity Term, 2. Anne, Roll

If the cuſtom of a manor be, that the lord may grant copyhold eſtates "to three "perſons, *ha-* "*bendum* to "them ſucceſ- "ſively, as they "ſhall be nam- "ed, and not "otherwiſe," A SURRENDER to *A.* for his own life, and for the lives of *B.* and *C.* is warranted by the cuſtom.—S. C. 1. Salk. 188. S. C. 3. Salk. 181. S. C. Holt, 263. S. C. 2. Ld. Ray. 994. 1. Mod. 102. Co. Lit. 58. 4. Co. 23. Poph. 35. Ld. Ray. 132. 2. Peer. Wms. 781. 3. Com. Dig. "Copyhold" (C. 3.). (C. 8.). (C. 10.). 1. Bac. Abr. 458.

UPON a ſpecial verdict the caſe was this: The cuſtom of the manor of *Tregueir* in *Cornwall* was found to be, that every cuſtomary copyhold of that manor might be granted to three perſons, *habendum* to them ſucceſſively, *ſicut nominantur, et non aliter*; and that on the death of every tenant the lord ſhould have his beſt beaſt for *a heriot*: and a ſurrender is found to have been to *T. N.* and his aſſigns, for his own life and the lives of two others.

The queſtion was, Whether this ſurrender were warranted by the cuſtom?—FIRST, For the whole; that is, for three lives.—And, SECONDLY, In caſe it be not good for three lives, Whether it be good for his own life?

In

SMARTLE *againſt* PENHALLOW.

In the argument of this caſe it was agreed, that a leſſee for years of a manor may grant a copyhold eſtate in fee, and ſo for life or lives, and the grant ſhall be good againſt him that has the inheritance. But it was urged, that if by making a leſs grant than the cuſtom warrants the tenure ſhould be altered, or any damnification of the ſervice occaſioned, ſuch grant of a leſſer eſtate than the cuſtom warrants would be void, and a prejudice would * enſue to the lord by this grant; for now it would be an eſtate for *auter vie* of which there might be an *occupant (a)*; and then the lord would have a tenant whom he knows nothing of, and *occupancy* may be of *a copyhold* as well as *poſſeſſio fratris*. It is true, a copyhold eſtate ſhall not have all the qualities of an eſtate at common law, as tenancy by the curteſy and dower, but theſe are excreſcent intereſts; and though the caſe of *Ven v. Howell (b)* be againſt this, yet it ſeems that the reaſon of the prejudice which would enſue to the lord is ſufficient to overthrow that; and if it cannot be good in all, it is more conſonant to law to make it void for the whole than to let it ſtand in part and avoid it for the reſt; for the cuſtom is in the nature of a power, which muſt be ſtrictly purſued: as if a tenant for life by a ſettlement have power to make leaſes for twenty-one years, and he makes a leaſe for thirty years, it is void even for the twenty-one years: ſo if there can be occupants, it cannot be good becauſe of the prejudice to the lord; if there cannot be occupancy, it cannot be made good to his aſſigns, becauſe not purſuant to the cuſtom; and then it cannot be good for the firſt life, becauſe leſs than the cuſtom (which is in nature of *an authority*) warrants.

* [64]

6. Co. 37. Vaugh. 187. to 205. 2. Bulſt. 11, 12, 13. Cro. El. 58. 721. Poſt. 68. Carth. 427.

Again: Suppoſe it might be good for the life of *T.N.* yet the jury not having found him alive, it ſhall not be intended: as if tenant for years or for *auter vie* bring an ejectment, he muſt aver the term or the life of *ceſtui que vie* to continue: and ſo here the jury ought to have found it, eſpecially when they have not concluded upon a ſpecial point, in which caſe the Court ſhall only conſider what the jury have made a doubt of, and all other things ſhall be intended; according to *Cro. Jac.* 622. and 6. *Co. Goodale's Caſe.*

Beſides, if this were conſtrued a good grant within the cuſtom, the lord would loſe his heriot; for the payment of that ſervice is confined to ſuch grant as is preciſely warranted by the cuſtom, viz. a grant to "three for lives *ſicut nominantur*;" and this is no ſuch grant, therefore no heriot; therefore it would be a prejudice to the lord, and by conſequence the grant is not good; and it will not be an anſwer to ſay that *heriot ſervice* is an accidental ſervice; for the ſtatute (*c*) upon which thoſe caſes of *Baugh v. Haynes (d)*, and *Dean of Worceſter's Caſe (e)* go, that orders the uſual rents to be reſerved, takes no notice of heriot, becauſe it is an accidental ſervice; but here the cuſtom ſpecially mentions a heriot to be part

2. Saund. 166, 167.

(*a*) See 29. *Car.* 2. c. 3. and 14. *Geo.* 2. c. 20.
(*b*) 1. Roll. Abr. 511.
(*c*) 13. *Eliz.* c. 10.
(*d*) Cro. Jac 76.
(*e*) 6. Co. 37.

of

MARTIN against PENHALLOW.

of that ſervice, and therefore it ought to receive the ſame conſtruction that thoſe caſes would in caſe the ſtatute had mentioned heriot.

At another day, in *Michaelmas Term*, for it was ſpoke to firſt in *Trinity Term*,

HOOPER, *Serjeant*, argued on the ſame ſide; and urged, that this could not be a grant within the cuſtom, for that is of a grant to three, *habendum ſicut nominantur ſucceſſive*; and the grant here is only to *T. N.* for the life of two more and himſelf; ſo it is no grant at all to the two *ceſtui que vie's*, nor is *T. N.* the firſt life mentioned. * And as to the objection of *qui poteſt plus poteſt minus*, if a man may grant in fee by cuſtom he may grant for three lives, it is true with ſome diſtinctions; if a man have power to grant in fee, reſerving rent, he cannot grant for life without reſervation.

Ante, 19, 20.

*[65]

SECONDLY, The eſtate granted muſt not only be leſs in judgment of law, but alſo in value; for if a man have power to let for three lives, and he lets for a hundred years, that indeed is leſs in judgment of law, but becauſe it is not leſs in value the grant is void. All authorities, whether created by act of parliament or by the party, as in ſettlements, or by cuſtom, as here, are ſtill but authorities, and therefore not to be varied from; and he quoted *Whitlock's Caſe (a)*, and the difference there, and put caſes upon the ſtatute that enables biſhops to make leaſes: If a biſhop who by the act may make a leaſe for twenty-one years make it for twenty-two years, it is void for all; and if a man make a leaſe by parol for four years, it ſhall not be good for three upon the ſtatute 29. *Car.* 2. c. 3. of Frauds and Perjuries: but he inſiſted chiefly upon an inconveniency that would enſue in this caſe; for if *T. N.* were a trader, and committed *bankruptcy*, this eſtate for three lives would be granted to an aſſignee, and then it would be quite out of the cuſtom; for then the aſſignee would hold it after the death of *T. N.* during the other two lives, and the lord would loſe his heriot.

WILLIAMS *contra*. We are upon the conſtruction of a grant to an honeſt purchaſer for a valuable conſideration.—This will be good, if not to him for his and two other lives, at leaſt for his own life; and that will do as well for us. The ſubſtance of the cuſtom is, to make a grant for three lives; that is, the quantity of the eſtate; but whether it be to one perſon for three lives, or to three for their lives, is only accidental and a quality; and the quantity or continuance of the eſtate is what is only material. The meaning and drift of the cuſtom is to hinder any longer incumbrance upon the land than for three lives, but not whether the lives named, or others, are to enjoy it; and ſince, by the cuſtom, it may be to three for their lives, *à fortiori* it may be to three for the lives of three others, for that is a leſs eſtate; and that which we contend for is leſs than

(*a*) 8. Co. 69. 1. Brownl. 196.

that

that again; and if the firſt grant had been ſtrictly purſuant to the letter of the cuſtom, as found, ſure it cannot be denied but that the ſeveral grantees might grant each his own eſtate, and the lord be compelled to admit each ſurrenderer; or that they might all grant their eſtates to one perſon, who then would have the ſame eſtate as we now contend for. And if ſo, why may it not be at the firſt? For it would be againſt all reaſon, that the grantees who claim under the lord ſhould do it, and not the lord himſelf: and he relied upon the caſe of *Ven v. Howell* (*a*) as full in point; for the reaſon given there rules this, *viz.* that it can be no inconveniency, but rather a conveniency to the lord; for ſince there can be no occupancy of a copyhold eſtate, it would be more advantageous to the lord to have ſuch a grant as this than to have it to the three perſons named for their lives; for upon the death of the tenant who takes for his own life and * two more, the eſtate would come to him again, whereas in the other caſe it would go to the next in remainder: and there is a known diverſity between the lord purſuing *a cuſtom* and one acting by *a bare authority*; the one has *authority* and an *intereſt*, and therefore may do leſs; the other has a *bare authority* without any intereſt, and for that reaſon cannot vary from it (*b*). But ſuppoſe this point were againſt me, at leaſt it will be good to *T. N.* for his own life, for that is leſs than for his own and two lives more (*c*). If by cuſtom the lord may grant for life, he may grant *durante viduitate*, though ſuch a grant were never made before; yet becauſe, at moſt, it can go no farther than the cuſtom warrants, and that poſſibly it may determine ſooner, it is good: So far of the grant as goes to him for life is good; and if the words "and for the lives of *A.* and *B.*" be repugnant or void, let them be rejected, for a void clauſe will be the ſame as if it were not in at all. *Hobart* (*d*) makes a difference, that where a tenant for years grants all his eſtate *habendum* after his death, the grant is good and the *habendum* void; but that where all is one entire ſentence, as if he had granted his eſtate after his death, the grant is all void: and ſome books make the difference where an implied eſtate is granted in the premiſes, for that may be avoided by an *habendum*, but otherwiſe of an expreſs eſtate; as if a feoffment be "to *A. habendum* "to him and his heirs after the death of *B.*" the whole is void by the *habendum*; and it may be reaſon, that where an *habendum* may encreaſe an eſtate it may likewiſe avoid it if it be againſt law; but here the *habendum* cannot encreaſe it, for it can make it but for life, and therefore cannot deſtroy it. There can be no occupant of a copyhold eſtate for two reaſons: THE FIRST, Becauſe there cannot be a tenant of a copyhold, but by ſurrender and admittance. SECONDLY, The ſtatute concerning ſpecial occupants (*e*) does not extend to it, becauſe there were no occupants could be before (*f*), and that the making it now would turn to the prejudice

* [66]

See 6. Co. 37. *cont.* 1. Sid. 136.

(*a*) 1. Roll. Abr. 511.
(*b*) Co. Lit. 52.
(*c*) 4 Co. 29.
(*d*) Hob. 171.
(*e*) See 29. Car. 2. c. 3. and 14. Ge. 2. c. 20.
(*f*) Adjudged in the court of common pleas, that the ſtatute extends to things that lie in grant; and of them there could be no occupancy; *ergo quære de hoc.*—NOTE *to the former editions.*

CASTLE *against* PENNALLOW.

of the lord; and the general words of an act ſhall not be extended to a copyhold eſtate, if it may prejudice the lord.

1. Vern. 234. 2. Vern. 265. 2. Mod. 352. 3. Mod. 123.

As to the objection, that the verdict does not find the life of *T. N.* to continue, I anſwer, that ſhall be ſuppoſed to continue until the contrary appear: and he quoted ſome caſes, that where one, having a bare power, exceeded that power, it ſhall be good for what is within the power, and void for the reſt *(a)*. If there be a letter of attorney to deliver ſeiſin to *A.* and he deliver it to *A.* and *B.* it is good to *A.* and void to *B.* though the making of livery is as entire an act as the limiting an eſtate can be *(b)*.

HOLT, *Chief Juſtice*, and THE COURT. If the cuſtom be to grant a copyhold eſtate for three lives, the lord in fee of the manor cannot exceed that, and a lord at will of it may go ſo far; for it is not material what eſtate the lord has in the manor: and ſure he who may grant for three lives may grant for one life; as if the cuſtom be, that he may grant a copyhold in fee *ſolummodo*, yet he may grant in tail, for life, or for years, * and here the three lives are only the extent of the cuſtom, but not to bind a man to the formality of an eſtate for three lives. The cuſtom in this caſe conſiſts of three parts:—FIRST, The conſtitution or creation of the eſtate, *viz.* that it be by copy.—SECONDLY, The extent of it, that it ſhall not exceed three lives.—THIRDLY, The manner of granting it, that if it be to three, they ſhall not take jointly and *in præſenti*, according to the courſe of the common law, but that the firſt named ſhall take all for his life, and the ſecond all for his life, and ſo of the third. If the cuſtom then enable him to let for three lives, it will enable him to do it for one; as if the cuſtom were to grant in fee, he might leaſe for life, remainder for life, or in tail, remainder in fee; for the cuſtom is not to grant one entire eſtate in fee: if the cuſtom be to grant for life, he may grant *durante viduitate*, though that be another limitation than for life: and generally where the cuſtom is to grant to three for their lives, *habendum ſucceſſivè ſicut nominantur*, there likewiſe the cuſtom is, that the tenant in poſſeſſion may by the ſurrender of his eſtate defeat the remainders.

*[67]

4. Co. 23. a. 30. a. Godb. 20. 1. Leon. 56. Cro. El. 323. 373. Mod. 627. 1. Roll. Ab. 511. l.

And HOLT, *Chief Juſtice*, put a late caſe in this court, where upon a ſpecial verdict this cuſtom was found, and the firſt of the three purchaſed the manor; and the queſtion was, Whether, inaſmuch as he had a power to fruſtrate the two remainders by ſurrender, he, by his purchaſe of the manor, had extinguiſhed them? And there it was held to be no merger or extinguiſhment of the eſtate, becauſe the cuſtom of deſtroying the remainders is confined to the formality of the ſurrender; and the purchaſe of the manor, though it be, between the parties, a ſurrender, yet it ſhall not be conſtrued as ſuch to other purpoſes, *viz.* to deſtroy the remainders; and if the grant had been only to *T. N.* in this caſe for his own life, that had been good; and if he had granted it to another grantee, he would have been tenant *pur auter vie*; and why may not that be by

(*a*) Co. Lit. 52. 258. (*b*) Perkins, 189.

the

the firſt grant as well as by meſne grants? I cannot tell; for this is no eſtate capable of occupancy; and if the firſt of the three commit a forfeiture, he in remainder ſhall not enter, but the lord ſhall enter, and hold it during the life of ſuch firſt tenant. SMARTLE *againſt* PENHALLOW.

As to the objection, that the heriot would be loſt, that is not ſo; for the lord would have a heriot upon the death of every tenant, and upon the death of *T. N.* here, and he is the only tenant; and though he has none on the deaths of the *ceſtuy que vies*, it is becauſe they are not tenants.

As to the objection, that the jury does not find the life of *T. N.*; it would be neceſſary to aver it in pleading, but not in a verdict; and we ſhall not intend him dead, eſpecially when the plaintiff makes title againſt him, and therefore ought to alledge his death, if the truth be ſo.

* But ſuppoſe *T. N.* had become *a bankrupt*, and this eſtate been aſſigned. I anſwer, Suppoſe it were to three *ſicut nominantur ſucceſſivè*, and the tenant in poſſeſſion become *a bankrupt*, ſhall not the caſe be the ſame? for the aſſignee ſhall be tenant *pur auter vie*. And the objection will be the ſame; for this is a conſequence upon the interpretation of the act of parliament, and ſhall not at all prejudice the lord; for if the aſſignee die during the life of the copyholder bankrupt, there will be a caſe out of the cuſtom by the tranſmutation of the tenant by the act of parliament, and yet the lord ſhall have his heriot; for it never was the intent of the ſtatute to put the aſſignee in a better condition than his principal, whoſe eſtate he has, would have been in, nor to work an alteration of tenement to the prejudice of the lord: this is ſuppoſing that the copyholder ſurviving ſhould not have it back again; and if he ſhall have it again upon the death of the aſſignee during his life, then the lord, by original cuſtom, ought to have a heriot, and a ſubſequent act of bankruptcy ſhall not defeat him of it; and if the copyholder had died, living the aſſignee, and thereby his intereſt determined, as ſome thought it would, Who ſhould pay the heriot? * [68]

But upon this point they ſeemed cautious of delivering any opinion, but reſerved themſelves until that matter ſhould come to be a queſtion, for they ſaid it was worth conſideration. Q.

POWELL, *Juſtice*, ſeemed to incline, that if the aſſignee had died, living the copyholder, the lord would immediately have the land; for the whole intereſt of the copyholder was veſted in him by the ſtatute. 1. Roll Abr. 504. Cro. Car. 204. Jones, 229. 3. Com. Dig. "Copyhold" (F. 14).

And POWYS, *Juſtice*, thought, that upon the death of the copyholder the eſtate of the aſſignee would determine, though the *ceſtuy que vies* were living.

Here IT WAS AGREED, that if a grant be made to *A.* for the lives of *B. C. D.* and *A.* dies, the lord ſhould have the land again, though againſt his own limitation, becauſe there can be no occupant of a copyhold eſtate without a ſpecial cuſtom; and this would

SMARTLE *againſt* PENHALLOW.

be no miſchief, becauſe the failure would be on the ſide of the grantee only; for if rent be granted to one for three lives, and he die without diſpoſition, living *ceſtuy que vies*, yet the grantor ſhall hold the land diſcharged, becauſe occupancy cannot be of a rent, for that only can be of lands which paſs by livery, whereby the freehold paſſes, and ſhall not revert again until the limitation be determined, and it is for the ſake of *a præcipe* of a ſtranger.

And PER TOTAM CURIAM the grant was held good.—And the ſame objection of *bankruptcy* might be made in the caſe of *Yea v. Howel* (*a*).

(*a*) 1. Ball. Abr. 511. Ante, 64.

MICHAELMAS TERM,

The Second Year of Queen Anne,

AT

The Sittings at THE GUILDHALL in London,

BEFORE

Sir John Holt, *Knt. Chief Juſtice*

OF

THE COURT OF QUEEN'S BENCH.

Leonard *againſt* Stacy.

Caſe 79.

THE caſe was: *A cheat* bought a quantity of goods from the defendant upon credit, and ſold them to the plaintiff. The defendant diſcovering that he was catched, and that the goods were come to the plaintiff's warehouſe, takes out a *replevin* out of THE SHERIFF'S COURT in *London*, and with ſeveral others takes the * goods again. And for this the plaintiff brought treſpaſs.

If *A* defraud *B.* of goods, and ſell them to *C.* and *B.* after notice that *C.* claims property thereon, replevy them, *C.* may bring *treſpaſs* for the taking.

S. C poſt. 139. S. C. Holt, 143. Poſt. 81. 103. 2. Salk. 5. 94. 2. Lev. 92. 1. Vent. 127. Ld. Ray. 984. 6. Com. Dig. "Treſpaſs" (C. 2.).

HOLT, *Chief Juſtice*, ſaid in this caſe,

FIRST, That in *replevin*, if property be claimed, and notwithſtanding the party replevies, *treſpaſs* will lie, and the claim or notice of property ſhall be the ſole iſſue.

In *treſpaſs* for making *replevin* after notice of a claim of property, the notice only is an iſſue. Poſt. 81. 103.—2. Salk. 5. 94. 2. Lev. 92. 1. Vent. 127.

SECONDLY, If ſeveral perſons are declared againſt, and ſome under a *ſimul cum*, to take off the evidence of thoſe that come under the *ſimul cum* ſomething muſt be proved againſt them, and likewiſe endeavours uſed to take them, as proceſs taken out againſt them, &c.

Defendants under a *ſimul cum* may be witneſſes, unleſs there is evidence againſt them.

THIRDLY, If treſpaſs be againſt two or more, and one *demur*, and another *plead to iſſue*, the damages aſſeſſed upon *the iſſue* ſhall affect him that demurred, if the demurrer be ruled againſt him:

Damages where one pleads to *iſſue* and another *demurs*.

LEONARD *against* STACY.

so if trespass be for breaking a house, and entering into a close, against one who pleads *not guilty* as to one, and *demurs* to the other, there the jury must find damages severally for the *not guilty*, and conditionally upon the *demurrer*; so if there be two defendants, and they vary their pleas as to the parcels in the declaration.

Persons concerned only as appraisers in a wrongful replevin are trespassers.

Some of the defendants here would give evidence, that they were no farther concerned than as *appraisers* to appraise the goods.

HOLT, *Chief Justice*, answered, that there could be no appraisement in *replevin*; and if there could, the taking here being *tortious*, he, being there all the while, would be guilty of it.

A *licence* must be pleaded. Post. 171. Cro. Jac. 377. 204. 5. Com. Dig. "Pleader" (3. M. 35.); and see the case of Bennett v. Allcott, 2. Term Rep. 166. *accord.*

Besides, if the law give a man *a licence* for the doing a thing, in *trespass* you must *plead it*, and not give it in evidence upon not guilty.

Case 80. Barber *against* Dennis.

Trover lies by a *master* for seaman's tickets earned by his *apprentice*. S. C. 1. Salk. 68. Cro. Eliz. 638. 661. 746. 12. Mod. 415. Vezey, 83.

THE widow of a waterman, who, as was said, by the usage of WATERMAN'S HALL may take an apprentice, had her apprentice taken from her, and put on board a queen's ship, where he earned two *tickets*, which came to the defendant's hands, and for which the mistress brought *trover*.

AND IT WAS AGREED, that the action would well lie if the apprentice were a legal apprentice, for his possession would be that of his master, and whatever he earns shall go to his master.

Quære, If a *freeman* of the Waterman's Company is a *freeman* of *London*.

But it was objected, that THE COMPANY OF WATERMEN is a voluntary society, and that being free of it does not make a man free of *London*: So that the custom of *London* for persons under one-and-twenty to bind themselves apprentices does not extend to watermen; which was agreed by all.

Indentures of apprenticeship must be enrolled. 3. Lev. 389.

Then it was said, that the supposed apprentice here was no legal apprentice, if the indentures be not enrolled pursuant to the act of parliament of 5. *Eliz.* c. 4. and if he were not a legal apprentice the plaintiff had no title.

But HOLT, *Chief Justice*, said, he would understand him an apprentice or servant *de facto*, and that would suffice against them, being wrongdoers.

Anonymous.

Anonymous.

Caſe 81.

IN another caſe, which was action of covenant againſt an apprentice for leaving his ſervice,

If a maſter may recal his licence to an apprentice, &c.

HOLT, *Chief Juſtice*, held theſe two points:

FIRST, * That if a maſter licenſe his apprentice to leave him, he cannot after recal that licence.

*[70]

SECONDLY, That if a maſter bring covenant for leaving his ſervice at ſuch a time, and the defendant juſtifies by virtue of *a licence* at that time, the maſter cannot upon that declaration give evidence of a leaving him at another time, for there *the time* is material, and is not like a tranſitory matter in treſpaſs.

In what caſe *time* is material. Poſt. 120. 2. Roll. Abr. 680. 687. Cro. Car. 514. 5. Com. Dig. "Pleader" (S. 12.)

MICHAELMAS TERM,

The Second of Queen Anne,

IN

The Common Pleas.

Sir Thomas Trevor, *Knt. Chief Juſtice.*

Sir Edward Nevil, *Knt.*
Sir John Powell, *Knt.*
Sir John Blencoe, *Knt.*
} *Juſtices.*

Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

Brigs *againſt* Collingſon.

Caſe 82.

TRESPASS for breaking the plaintiff's houſe, and entering into it, and taking and carrying ſuch and ſuch goods to ſuch and ſuch a value.

In treſpaſs for breaking and entering the plaintiff's houſe, and carrying away his goods, if the defendant plead *not guilty* as to the breaking, and juſtify the *entring*, by virtue of proceſs from an inferior court, but ſay nothing as to the carrying away; *qu.* If good. Co. Lit. 145. 3. Lev. 281. 10. Mod. 25. Ld. Ray. 410. 465. 712. 902. 1054. 8. Mod. 120. Stra. 637. 509. 820. 1224.

The defendant pleads *not guilty* as to the breaking of the houſe, and juſtifies *quoad* the entering, taking, and carrying away the goods; for that *K.* is an ancient borough, in which there is an ancient court to be held by virtue of letters patents, *et conſuetudinem curiæ pred.* every three weeks on *Thurſday*, and that it has conuſance of all debts and actions ariſing within, &c. not exceeding forty pounds; that ſuch a day and year *J. S.* did there levy a plaint for fifteen pounds againſt the plaintiff for a cauſe ariſing within their juriſdiction; found pledges; and made proteſtation to follow, &c.; that thereupon *a proceſs* was directed to the defendant to ſeize his goods and chattels, in order to bring him to appear; that by virtue thereof they attached him by his goods and chattels in the declaration mentioned, and them ſafely kept to the intent to compel an appearance.

CARTHEW, on demurrer to the plea, took ſeveral exceptions:

FIRST,

Court held by letters patents and cuſtom.
2. Jones, 165.
3. Lev. 141. 243.
Lutw. 918.
1457. 1464.

FIRST, They ſhew the court to be held by *letters patent* and *cuſtom*, which is repugnant.

PRAT *contra*. We ſhew the court was held by ſeveral letters patents, and we need not ſhew by what king or queen, or the date of them; and as to *conſuet.* without *tempore cujus, &c.* it does not imply a preſcription, but only an uſage.

Court held according to cuſtom of the court.

SECONDLY, It is ſaid to be held according to the cuſtom of the ſaid court, which is abſurd; for it ſhould be, by cuſtom of the vill or borough in which it is held.

See the caſe of Williams *v.* Jones, B. R. H. 298.

A juſtification by virtue of proceſs muſt alledge that it was delivered to the defendant.
2. Lev. 19.
3. Lev. 93.
5. Com. Dig. "Pleader" (3. M. 24.).

THIRDLY, It is not ſaid that the proceſs was delivered to them ſo as they might execute it; and the *virtute cujus* is not traverſable; and therefore in all pleadings where the ſheriff juſtifies by virtue of a writ, he alledges, that before the execution the writ was delivered to him, and the *virtute* comes after, otherwiſe anybody might take upon himſelf to execute a writ ſued out, though not delivered to him.

PRAT *contra*. We are upon a general demurrer, and we ſay it was directed to us, and that by virtue of it we ſeized them, which is impoſſible to be true if it were not delivered to us.

The bailiff of an inferior court who abuſes the proceſs is a treſpaſſer *ab initio*.
Poſt. 139.
8. Co. 146.
2. Roll. Ab. 561.
Moor, 248.
1. Lev. 95.
4. Mod. 391.
Stra. 1272.
2. Wilſ. 313.
2. Bl. Rep. 1218.
1. Ter. Rep. 18.

FOURTHLY, The attachment ought to be moderate and reaſonable, as to the value of twelvepence, eighteenpence, or two ſhillings, at firſt, and if he did not appear upon that, to double that infinitely; and here they have taken all the party's goods; ſo that if we had come with affidavits of this oppreſſion, you would have granted *an attachment* for the abuſe; and if one abuſe the authority the law gives him, he is a treſpaſſer *ab initio*, for the diverſity is between licence of law when abuſed and actual licence of the party (*a*).

PRAT *contra*. The proceſs is to attach him *per bona et catalla*; and the law does not define how much they ſhall take; and it is in plaintiff's power to have all by giving an appearance, and they are only to be a pledge for his appearance in the mean time.

* [71]

When a ſheriff juſtifies under a *writ*, he muſt ſhew it returned.

* FIFTHLY, Though they were aware they muſt ſhew a return; for whenever the ſheriff, or officer to whom the writ is directed, will juſtify under it, he muſt ſhew a return, otherwiſe if under bailiffs to a ſheriff (*b*); and here they only ſay, *debito modo retornat.* which might be if they had returned *nulla bona*; and the Court could not make them mend or change it.

PRAT *contra*. We ought to make a return true, and we have ſo done; for when we confeſs that we have taken the goods, and alledge a return *debito modo*, that muſt be according to truth.

(*a*) See the Six Carpenters Caſe, 8. Co. 146. (*b*) Cro. Car. 446.

SIXTH

SIXTHLY, We charge them in the declaration with having taken the goods and carried them away, and they juſtify only the *taking*, and ſay nothing as to the carrying away. Bates *againſt* COLLINGSON.

TREVOR, *Chief Juſtice.* You have not anſwered the *carrying away*, ſo it is not within your *not guilty*, nor admitted by your *juſtification*; for if you juſtified the carrying them away, perhaps you would have given them a new cauſe of demurrer, for they ſhould not have carried them away until failure of appearance: as to the exceſs, that will not make it a treſpaſs, for that is only an irregularity; and your ſaying in the declaration that they were of ſuch values is nothing.

CURIA *accord.* and ſeemed ſtrong for the plaintiff for want of anſwer to *aſportation*, but gave him time until next Term to maintain it.

Biſhop of Durham *againſt* Ladler. Caſe 83.

DEBT UPON A BOND conditioned for the obligor's ſubmiſſion to the church. Debt upon a bond given to a biſhop for ſubmiſſion, &c.

The bond was given in the year 1693, and there being a general act of pardon ſince that time, 5. Com. Dig. "Pardon" (F.).

The queſtion was, Whether, ſince that act took away the offence and excommunication, it would not likewiſe diſcharge the bond?

And the caſe of the *Biſhop of Exeter v. Sterling* in my LORD HALE's time, now in *Levinz's Reports* (*a*), was remembered, and ſaid, that there never was any judgment upon THE ROLL.

It went over to be ſpoke to this Term.

(*a*) 2. Lev. 36.

* Michelſon *againſt* Cawſey. Caſe 84.

AN ACTION UPON THE CASE for the eſcape of one taken upon the proceſs of an inferior court. The plaintiff declared, that he levied *a plaint* ſuch a day, &c.; that proceſs iſſued, and was delivered to the defendant, who, by virtue thereof, took the party at ſuch a place, &c. and ſuffered him to eſcape, *per quod*, &c. *Quære*, In an action for an eſcape from cuſtody under proceſs of an inferior court, whether it be neceſſary to ſtate in the declaration by what authority the Court was held.

The exception taken to the declaration was, that it did not ſhew by what authority the court was held, and then the whole proceedings were void, and therefore the impriſonment was falſe, and the eſcape no offence or injury to the plaintiff.

Ante, 61. Vaugh. 93, 94. Yel. 46. Cro. El. 489. Cro. Jac. 184. 493. 532. Cro. Car. 46. 1. Jo. 451. Ld. Ray. 1543. 11. Mod. 50. 12. Mod. 598. Ld. Ray. 424. 555. 651. 705. 788. 1530. Stra. 873. 901. 951. 1226. 3. Com. Dig. "Courts" (P. 6.). 5. Com. Dig. "Pleader" (E. 18.).

And

Mickesson against Cawsey.

And for this was quoted *Turner's Caſe (a)*, where, in pleading a judgment in an inferior court, the party was forced to ſhew the authority of the court, and to give it juriſdiction. And if ſo in a plea in bar, which is good to a common intent, *à fortiori* it will be in a declaration which charges the party, and therefore muſt be certain to all intents: and here if there were no legal court, or if it wanted juriſdiction, the officer would be liable to an action of falſe impriſonment, and likewiſe to an eſcape. And it was ſaid, that it is eſſentially neceſſary, let the plaintiff be a ſtranger or privy, to give the court juriſdiction.

CARTHEW anſwered with this diverſity, that any who is an officer of the court, or acts under the authority of it, and by conſequence ought to be conuſant of it, ought in pleading to ſet it forth; but ſtrangers, as the plaintiff is here, need not do it. 2. The *plaint*, the *proceſs*, and the *arreſt*, are only inducements to the action, and the *eſcape*, whereby, &c. is the ſubſtance; therefore it ſuffices if the ſubſtance be well ſet forth, and that is done here. And for this he quoted the caſe of *Hodges v. Moyſe (b)*. Beſides, he urged that though this would be the cauſe of reverſal or irregularity, yet the ſheriff could not take advantage of it. In the caſe of *Gould v. Stroud (c)*, an action for an eſcape was brought againſt a ſheriff; and it appeared, that the action was brought upon a judgment in WESTMINSTER-HALL by an adminiſtrator, and that adminiſtration was committed to him by the ordinary of another dioceſe, ſo as it was utterly void; and yet plaintiff had judgment.

TREVOR, *Chief Juſtice*, and BLENCOE, *Juſtice*, conceived the law to be, that where-ever one juſtifies by virtue of proceedings of an inferior court, or makes it a ground for an action, he ought to ſhew the authority by which the court is holden, and that the whole of the proceedings were the *gift* of the action here, and if that were actually void, that the plaintiff ought not to have judgment, though the officer cannot take advantage upon error in proceſs. But they doubted whether the defendant, having taken upon himſelf to arreſt him, did not thereby make himſelf liable to an eſcape.

But TRACY, *Juſtice*, ſeemed to differ from them, upon the authority of *Hodges v. Moyſe (d)*.

And it was *Curia adviſare vult*.

(a) 8. Co. 133.
(b) Cro. Car. 45, 46.
(c) Gould v. Stroud, Mich. Term, 2 *Will.* 3. in king's bench.—See alſo Cro. Eliz. 895. 2. Mod. 195
(d) Cro. Car. 45.

MICHAELMAS

MICHAELMAS TERM,

The Second of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Turton, *Knt.*
Sir Lyttleton Powys, *Knt.*
Sir Henry Gould, *Knt.* } *Juſtices.*

Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

* Warren *againſt* Mathews.

Case 85.

PER CURIAM. Every ſubject of common right may fiſh with lawful nets, &c. in a *navigable river*, as well as in *the ſea* (*a*), and the king's grant cannot bar them thereof; but the crown only has a right to royal fiſh, and that the king only may grant.

Lawful fiſhing.

S. C. 1. Salk. 357. 2. Salk. 637. 6. Com. Dig. 56.

(*a*) See Lord Fitzwalter's Caſe, 1. Mod. 106. 2. Lev. 139.; Carter *v.* Murcot, 4. Burr. 2163.; Seymour *v.* Courtenay, 5. Burr. 2814.; Mayor of Lyner *v.* Turner, Cowp. 16.; The Mayor of Oxford *v.* Richardſon, 4. Term Rep. 437. —But ſee the judgment in this laſt caſe reverſed, 2. H. Bl. Rep. 282.

Anonymous.

Case 86.

THE COURT HELD, That let a proſecution be never ſo maliciouſly carried on, yet if there be *probable cauſe* or ground for it, no action for malicious proſecution will lie (*a*).

No action for *malicious proſecution* will lie if there was *probable cauſe*. Ante, 25.—4. Burr. 1971. Poſt. 216. Ld. Ray. 81. 377.

(*a*) An action for malicious proſecution will not lie for bringing a *civil* action, although the plaintiff has no grounds for it, becauſe it is a claim of right, Savil *v.* Roberts, 2. Salk. 14, 15. *Sed vide* Wateren *v.* Freeman, Hob. 260. but it will for holding to bail for a greater ſum than is really due, Dare *v.* Swaine, 1. Sid. 424. Skinner *v.* Gunton, 1. Saund. 228. or for ſuing in a good cauſe of action in a court that has not juriſdiction, Godlin *v.* Wilcox, 3. Wils. 302. Atwood *v.* Monger, Stiles, 378. but in ſuch caſe it muſt be a want of *original juriſdiction*, Watchouſe *v.* Bawd, Cro. Jac. 133. But to maintain this action it is now ſettled that the plaintiff muſt ſhew both *malice* and a want of *probable cauſe*, Bull. N. P. 14. but *malice* may be inferred from the want of *probable cauſe*, Johnſton *v.* Sutton, 1. Term Rep. 544. Reynolds *v.* Kenedy, 1. Wils. 232.

Saunders

Case 87. Saunders *againſt* Melhuiſh.

In ejectment, if the tenant be tricked out of poſſeſſion the Court will order reſtitution, and commit the parties to anſwer interrogatories.
S. C. Ante, 16.
S. C. Holt, 136.
1. Barnes, 125.
2. Barnes, 157.
12. Mod. 211. 313. 398. 445. 653.
2. Com. Dig. "Chancery," (D. 3.)
Tidd's Prac. 52.

MELHUISH had got an unknown perſon to aſſume the name of *tenant in poſſeſſion*, and to perſonate him in receiving a declaration in ejectment; and, upon the uſual affidavit, tricked the plaintiff out of his poſſeſſion.

And the matter being made out by affidavits, and even by the affidavits of the two comrogues, *viz.* he that delivered, and the other that received the declaration,

THE COURT ordered reſtitution; for no man's poſſeſſion ought to be diſturbed upon the affidavits of ſuch infamous witneſſes.

And *Melhuiſh*, the plaintiff in ejectment, attending, was committed to anſwer interrogatories.

For HOLT, *Chief Juſtice*, ſaid, When one is put to anſwer interrogatories for a fact fully proved againſt him, he ought to anſwer in cuſtody; but where it is any thing doubtful, the courſe is to put him to anſwer, that is, to bind him by recognizance to anſwer. And in either caſe, if they purge themſelves upon oath, they are diſcharged; but they may be proſecuted for *perjury* if they ſwear falſe (*a*). And if the interrogatories be not exhibited in *four days*, by the courſe of the court they are diſcharged.

(*a*) 2. Jones, 178. 3. Burr. 1329. Dougl. 498. 2. Hawk. P. C. ch. 22. ſ. 1.

Case 88. The Caſe of Elderton, Porter, and Others.

Qu. Whether the commiſſioners of the *Board of Green Cloth* can, as juſtices, commit a man to "the porter "of the verge."
S.C. 2. Ld. Ray. 978.
S. C. 3. Salk. 91. 284.
S. C. Holt, 590.
1. Mod. 76.
2. Vent. 169.
* [74]
2. Mod. 181.
Philip's Regale neceſſarium, chap. 1. and 3.
Pryn on 4. Inſt. 33, 19.
12. Mod. 102. 155. and ſee the caſe of Rex v. Stobbs, 3. Term Rep. 735.

THE defendants were taken up by a warrant from the LORD HIGH STEWARD, treaſurer, comptroller, and clerk of THE GREEN CLOTH, ſetting forth a complaint made to THE BOARD OF GREEN CLOTH, of a forcible entry made by them into a houſe in *Scotland-Yard*, in the queen's royal palace of *Whitehall*, rioutouſly, and in contempt of the privileges of the queen's palace, and without warrant from THE GREEN CLOTH.

The warrant was directed "*portatoribus virgarum hoſpitii* of "the queen;" and they not giving bail, were committed to LOVET, *porter of the palace*, "to receive and keep them till they gave bail "for appearance at the next ſeſſions to be held for THE VERGE, or "until he received further directions from THE BOARD OF GREEN "CLOTH;" and * being brought up by *habeas corpus*, a return was made to the commitment for the cauſe aforeſaid, by the perſons aforeſaid, all of whom were returned to be *juſtices of peace* for THE VERGE.

MONTAGUE took theſe exceptions:

FIRST, The warrant ſets forth an information made to this board, without ſhewing what board; and if it had expreſſed THE BOARD OF GREEN CLOTH, it had not mended the matter; for as

ſuch

THE CASE OF ELBERTON, PORTER, AND OTHERS.

ſuch their power is only over the ſervants of the family, and over none elſe, even in caſe of treſpaſs or bloodſhed, or any other breach of the peace; for that which gives them a power is the ſtatute of 33. *Hen.* 8. c. 12. and therefore they have no farther authority than that act gives them.

A PALACE retains its privileges, though the court and king wholly remove from it. Salk. 91. 284.

SECONDLY, The queen did not then actually reſide there, nor does it ſet forth that ſhe did, and it cannot be ſaid a breach of privilege, for two reaſons: *Firſt*. The queen's honour is as much concerned that the proceſs of law ſhould be duly executed, as in the privilege of her palace. *Secondly*, By the late act of parliament all privileges are taken away; and that act is to be conſtrued favourably in the execution of juſtice.

A juſtice need not mention in his warrant, that he is a juſtice. Ld. Ray. 65. 100. 213. 323. 353. 396. 424.

THIRDLY, If it be ſaid, that they have conuſance of it as juſtices of peace, they ſhould have committed them as ſuch, and under a proper officer, as conſtable, &c.

Concluſion of warrant of commitment.

FOURTHLY, The concluſion of the commitment is not legal; for it ſhould be, "till they are delivered by due courſe of law;" but this is, "till they find ſurety for their appearance at the next "court of THE VERGE" (*a*), and it is not ſaid when that is to be, or that ever there will be any.

FIFTHLY, They ſay, it was in breach of the privilege of the queen's court, but they do not ſtate what thoſe privileges are, that the Court may judge whether this fact be againſt them.

NORTHEY, *Attorney General*, for the return,

FIRST, The authority of the party committing never appears upon the commitment, but always upon the return, and that is the right way. It is objected, that they have no power to commit as A BOARD. But I anſwer, that it is not neceſſary to inquire into their power as they are A BOARD now, for though they meet there about other buſineſs, yet their being there does not make them ceaſe to be juſtices of the peace, and they have their ſeſſions for THE VERGE, and the commitment is, "till they find ſurety for "their appearance at the next ſeſſions of THE VERGE." It never was the intent of the late ſtatute (*b*) to expoſe the queen's palace to the diſorder that often attends execution of proceſs: and he quoted *Jacob Hall's Caſe* (*c*). There needs not an act of parliament to make A PALACE, for it is the king's right to declare a royal palace, and the privileges follow of conſequence: *King William* declared KENSINGTON a palace. * Warrants are not like pleadings, as being made by perſons entruſted with the execution of the law, but have not the nice knowledge of it. Commitment till he find bail, or commitment generally for want of

1. Vent. 189. 2. Keb. 846. 2. Mod. 182. 1. Mod. 76. Vid. 3. Inſt. 141. 27. Aſſ. pl. 49.

* [75]

Philip's Regale neceſſarium, cap. 1. and 3. and vide Wilkins LL. Æthelſtani, p. 63. and Hen. 1. p. 245. 1. Salk. 348, 349. 351. &c.

(*a*) 2. Inſt. 52. 591. 3. Lev. 230. Cro. Car. 558. 5. Mod. 308. 2. Hawk. P. C. ch. 16. ſ. 18. *ante*, (*b*) (*c*) 1. Mod. 76.

bail,

THE CASE OF ELDERTON, PORTER, AND OTHERS.

bail, is the ſame; for whoever is committed for want of bail, is in truth committed until he find bail. Where-ever there is a palace, the privilege of a palace is incident to it, whether there be an actual reſidence or not; and the ſtatute of 33. *Hen.* 8. c. 12. was needleſs, though it makes this caſe the ſtronger; and that ſtatute ſetting limits to WHITEHALL, ſhews that there are local privileges belonging to THE PALACE; and what can they be, if they be not that ſomething may be lawfully done elſewhere that may not be ſo done there? This being in the outward part of THE PALACE makes no difference, for they ſhall ſet no other bounds to privileges than the act has done here.

HOLT, *Chief Juſtice.* It need not appear in the warrant or commitment that they were juſtices of peace, but that is always upon the return. Theſe fellows are very wilful, for either they are right or they are wrong, and why may not they find bail, and have the matter determined legally? There is a commiſſion of *oyer and terminer*, and a commiſſion *of the peace* for *the verge*; and THE LORD STEWARD has only a commiſſion for *the houſhold*. The matter therefore will be only this, Whether this being done within THE QUEEN'S PALACE, and it not being ſaid that the queen was actually reſiding there; that is, Whether the privilege be not confined to the reſidence? Another queſtion will be, in caſe it be confined to a reſidence, What will amount to a reſidence? For ſuppoſe the queen were at *Windſor*, and a murder was committed at *Whitehall*, ſhould THE LORD STEWARD judge of it upon the ſtatute of 33. *Hen.* 8. c. 12.? Or ſuppoſe it were now at *Wincheſter*?

NORTHEY, *Attorney General*, put the *caſe of Burchett* (*a*), who killed his keeper in THE TOWER, and though the king did not reſide there, yet becauſe it was in his palace, his hand was cut off firſt, and after he was hanged.

HOLT, *Chief Juſtice.* Though the words of the ſtatute be, "or other houſe where the king is reſident," thoſe words are only to give the ſame privileges to houſes that are not palaces during the king's reſidence. As to the objection, that they are committed for not giving ſecurity to appear at the ſeſſions of THE VERGE, and it does not appear that they have juriſdiction of it, we are judicially to take notice of all things belonging to THE QUEEN, and by conſequence of the power and juriſdiction of the ſeſſion of THE VERGE of the palace.

POWELL, *Juſtice.* Sure the words "other houſes where the "king reſides," is only applicable to houſes, not palaces, and ſure the privilege of a palace is not confined to actual reſidence (*b*). And he inſiſted on *Burchett's Caſe* aforeſaid.

*[76] THE OTHER TWO JUDGES ſeemed of that opinion: and beſides, if it were confined to a reſidence, the queen's ſecretary of ſtate keeping his office here, would be good evidence * of a reſidence.

(*a*) 3. Inſt. 140. (*b*) See 1. Hawk. P. C. c. 21. ſ. 2.

POWELL,

THE CASE OF ELDERTON, PORTER, AND OTHERS.

POWELL, *Juſtice*, ſaid, that he had known arreſts condemned for being in *Whitehall* without leave; and if an arreſt be made in *Weſtminſter-hall*, ſitting the court, it is a *contempt*; and why may not it be the ſame if in THE QUEEN'S PALACE, to the diſturbance of the queen or her ſervants? And the conſequence might be very dangerous, to ſuffer a number of fellows in a rude manner, under colour of proceſs, to enter into THE QUEEN'S PALACE. It is true, we do not know in this court that THE BOARD OF GREEN CLOTH has juriſdiction here, but the members are returned to be *juſtices of the peace*, and we know there is a commiſſion of *the peace*, and of *oyer* and *terminer*, for THE VERGE, which gives power to puniſh riots, treſpaſs, &c.

He ſaid farther, that THE MARSHAL of the queen's houſe is the gaoler, and that the commitment properly ought to be to him; but perhaps it might be to *the porter*, in order to carry the priſoner to THE MARSHAL, as in this court to *a tipſtaff*; but ſtill the commitment ought to be to THE MARSHAL, and their authority is to commit as *juſtices of peace*, and not as *a board*. It is true, if the commitment had been by them generally, we would have underſtood it to have been in that capacity in which they lawfully could do it; but whether they have not tied it up to their power as BOARD OF GREEN CLOTH, ſo as to leave no room for ſuch intendment, is a queſtion. However, if the commitment ſhould be bad for theſe faults, we may indeed diſcharge the defendants of their preſent impriſonment, and bind them to appear at the ſeſſions of GREEN CLOTH; as if a commitment be to *The New Priſon*, it is not lawful, as not being a legal gaol, yet we will not ſet the party at liberty, but commit him legally by virtue of the univerſal power of the Court: and though this *porter* be not a proper officer, we may remand them to him until we conſider of the matter, and order them to be brought up again by rule, and all matters to ſtay in the mean time as they are.

Court remanded the priſoners without bail.

And after the return was filed, though they offered bail for their appearance here the laſt day of Term, yet THE COURT remanded them, and gave rule for the bringing them up two days after, and would not bail them in the mean time.

Puniſhment for ſtriking in a royal palace. 3. Inſt. 140. 2. Inſt. 549. Vide 2. E. 3. 13. and 19. E. 3. F. Judgment 174. 51. E. 3. F. Coron. 280. Dyer, 188. St. 25. E. 3. c. 1. and note 33. H. 8. c. 12. of ſtriking in the king's court, 3. Inſt. cap. Miſpriſion. Philip Regale neceſſarium, 18. 24. &c. 39. E. 3, 4. 35. Mich. 40. E. 3. 4. 34. Flet. lib. 2. c. 23. Ryley Plac. part, 6, 7. 27. Aſſ. 49. Pryn. on 4. Inſt. 18, 19. Cotton, &c. 1. Lev. 106, 107. 1. Sid. 211. Cro. Car. 272. 4. Bl. Com. 125. 273.

NOTE, The Chief Juſtice upon this occaſion ordered the record of *Burchett's* attainder to be brought into court, and it is *Michaelmas Term*, 15. & 16. *Eliz. Roll.* 2. and there is no judgment there that his hand ſhall be cut off, though THE CHIEF JUSTICE ſaid, his hand had been in truth cut off, and ſo is my *Lord Coke* and *Stow's Hiſtory*.—Nothing further was ever done in this matter that I have found. But *vide poſtea*.

Caſe 89.

* Overſeers of the Poor of the Pariſh of St. Andrew.

An appointment of overſeers muſt ſtate them to be *ſubſtantial houſeholders*, purſuant to 43. *Eliz.* c. 2. 2. Salk. 525. Foley, 5. Sayer, 279. Stra. 1261. Ld. Ray. 1394. 2. Term Rep. 406. 395.

AN order of two juſtices for one's taking upon him the office of overſeer of the poor, being removed,

MONTAGUE took ſeveral exceptions againſt it.

FIRST, That it did not appear by it, that the party was an inhabitant or a houſe-keeper, and you will not intend him to be either; for it is not like the caſe of *Kibbet v. Lee (a)*, where a man ſhall be intended to be in his ſenſes, or a witneſs credible, until the contrary appears: and the way is, for the pariſh to preſent theſe officers to the juſtices to be by them confirmed.

Qu. If an appointment of overſeer for that part of the pariſh which lies in a particular county, be good. Sayer, 278. 1. Bott P. L. c. 1. ſ. 7. 4. Term Rep. 550.

SECONDLY, The order appoints him overſeer of the poor of that part of the pariſh that lies in *Middleſex*, (for the pariſh of *St. Andrew* extends both into *London* and *Middleſex*); and for this the caſe of the houſe of correction for *Blackheath* was relied on.

THE COURT ſeemed to think that the appointment ought to have been for the whole pariſh; but that afterwards they might order him to meddle only with ſuch a diviſion.

(*a*) Hob. 312.

Caſe 90.

Lutterell's Caſe.

After a verdict in *trover*, an indictment will lie for *treſpaſs* in taking the ſame goods; but if the taking be *felonious*, no verdict can be given. 3. Inſt. 213. Hob. 138. 2. Lev. 208. 2. Hawk. P. C. ch. 47. ſ. 6.

BY HOLT, *Chief Juſtice*, at *niſi prius*, *ut audivi*, this difference was taken: If a civil action be brought, as *trover* for goods, after recovery, you may indict him for treſpaſs or felony for the ſame taking, becauſe the offences or cauſes of action are of a different nature, the one civil, and the other criminal; but if the firſt proſecution had been criminal, as an indictment for treſpaſs, &c. and the crime appears to be felony, there you cannot have verdict or judgment on the indictment for treſpaſs, it being the inferior. And this, he ſaid, had been adjudged in *Mr. Luttrell's Caſe*.

Caſe 91.

Jordan *againſt* Thomkins.

Indebitatus aſſumpſit lies for diet found for a third perſon. Poſt. Hob. 216. 1. Vent. 6. Raym 302. 1. Salk. 22. 25.

INDEBITATUS ASSUMPSIT for meat, drink, and lodging found for a third perſon.

It was moved in arreſt of judgment, that *indebitatus aſſumpſit* will not lie, but that it ought to have been a ſpecial action upon the caſe.

But PER CURIAM, It lies againſt him upon *the contract*; as if *A.* deſire *B.* to cure the horſe of *C.* and that he (*A.*) will pay him ſo much, an *indebitatus* will lie againſt *A.* and only againſt him. But they agreed that it would not lie for money won at play, but a *ſpecial aſſumpſit*.

And the plaintiff had judgment.

Anony-

Anonymous. Caſe 92.

PER CURIAM. If one give a warrant of attorney to confeſs a judgment for the ſaving bail harmleſs, though the debt be not paid, he cannot ſue execution before damnification.

Bail cannot ſue on a counter ſecurity till they are damnified.

2. Bl. Rep. 795. 1. Term Rep. 86. 3. Term Rep. 539.

* Smith *againſt* The Mayor and Aldermen of London. Caſe 93.

A MERCHANT who had broke, and run away beyond ſea, conſigned goods to three perſons here for the equal benefit of his creditors, two whereof were his conſignees, and ſet up a truſtee for them to *attach* the goods in *London:* The third conſignee, to whom nothing was due, offered to appear; the other two would not appear; and the Court would not receive the third man's appearance without he appeared for all, which he could not juſtify doing, having no warrant for it.

If goods be conſigned to three perſons *in truſt*, and the goods are *attached* in *London*, one of the conſignees cannot appear without the others.

And now *a prohibition* was moved for, becauſe they refuſed his plea.

HOLT, *Chief Juſtice.* If they refuſe your plea, your way is by *bill of exceptions:* if they proceed otherwiſe erroneouſly, you may have *a writ of error*; and we are not to *prohibit* inferior courts becauſe they proceed againſt law, for in that caſe the law gives another remedy.

A *prohibition* does not lie to an inferior court for proceeding *erroneouſly*, unleſs the cauſe be out of its juriſdiction.—1. Salk. 288.

SECONDLY, Upon *an attachment* of goods there goes a *ſcire facias* by way of *garniſhment*, and two of the *garniſhees* will not appear; the third offers to appear and plead, but is not admitted without appearing for all. Sure this courſe is of very ill conſequence, and here we can have no *bill of exceptions*, becauſe we are not in court until appearance; and they will not ſuffer us to appear, though a *bill of exceptions* be always of matter not appearing of record.

Proceſs upon an attachment in *London*.

Skinner, 516. 669. 12. Mod. 213. 249. 320. 326. 407.

And THE COURT were ſtrong againſt the cuſtom of compelling one *garniſhee* to appear for the reſt.

And here they ſaid, there could be no *certiorari*, becauſe they could not proceed in this court according to the cuſtom of *London*.

A *certiorari* does not lie to remove a *foreign attachment*.

DEE, *the Common Serjeant*, ſaid, that in ſuch caſe, if he had put in bail, and waged his law alone, it would have diſſolved the *attachment*.

This caſe was put: If *a præcipe* be brought againſt two, and one of them appears, and takes the whole tenancy upon himſelf, and traverſes the other's having any thing, and pleads in chief, he may do it.

And *Curia adviſare vult.*

Case 94.

The Queen *againſt* Ball.

If a perſon committed on an *excommunicato capiendo* eſcape, a *new writ* ſhall iſſue, if the ſheriff has not returned the old writ, or the party been removed by *habeas corpus*.

BALL was charged in the ſheriff's cuſtody upon an *excommunicato capiendo*, and committed to THE FLEET charged therewith, and was removed from thence by *habeas corpus* to THE KING'S BENCH, where he was ſuffered to eſcape.

And what could be done, was the queſtion.

FIRST, it was agreed, that if the firſt writ were not returned, they might take a new one, and thereupon take him up *de novo*; otherwiſe, if it were returned, 1. *Roll. Rep.* 174.

* [79]

Ante, 21, 22. 37. 63. Poſt. 95. 125. 154. 283. 4. Com. Dig. "Excommengment" (B. 4.). Stra. 43. 901. Ld. Ray. 788. 527. 3. Mod. 275.

SECONDLY, it was doubted, whether there could be a new writ in caſe the former had * not been returned; becauſe by the *habeas corpus* and the return thereof here on record, it appears that he was in execution upon that writ.

THE COURT. If the eſcape had been in the preſent marſhal's time, we could make a rule upon him to take him up, but we cannot do it now, the eſcape having been in the former marſhal's time; becauſe, if the eſcape were voluntary, the former marſhal could not juſtify doing it himſelf; and let us conſider whether we cannot make a record of his having eſcaped, and award a new writ.

PER CURIAM. Let it ſtay a little, and know whether the former writ be returned.

Case 95.

Jonſon *againſt* Shepney.

The court of admiralty has juriſdiction in the caſe of an *hypothecation* given by the maſter of a ſhip for neceſſaries occaſioned by diſtreſs *at ſea*, although the contract was *upon land*.

A SHIP being in diſtreſs, on the high ſea, in her voyage, put into *Boſton* in *New-England*, and there was *hypothecated* by THE MASTER for neceſſaries.

And being libelled againſt here, *a prohibition* was moved for, becauſe the contract appeared to be upon land, even on their own libel.

S. C. 1. Salk. 35. S. C. 11. Mod. 30. S. C. Holt, 48. S. C. 2. Ld. Ray. 982. Ante, 11. 25. Hob. 12. 115. 1. Vent. 32. 238. Latch, 252. 1. Lev. 267. 1. Sid. 418.

It was urged againſt it, that if the diſtreſs, which occaſions the contract, be on ſea, though the things be bargained and agreed for at land (for it is not to be ſuppoſed they can be had at ſea), in caſe of *hypothecation* they have juriſdiction, otherwiſe the prejudice would be intolerable to navigation. And the caſe of *Benſon v. Jeoffries*, in Hilary Term, 1696, was quoted.

HOLT, *Chief Juſtice*. When a ſhip is in diſtreſs in her voyage, and *hypothecated* for neceſſaries, we allow THE ADMIRALTY a juriſdiction, for there is no other way for the captain to have credit but that, and they can have no remedy by our law againſt the ſhip. This point was argued and reſolved by all the Judges in the caſe of *Croſtwick v. Lowſely*, in the firſt year of *William and Mary* (*a*).

2. Keb. 511. 610. Moll. Lib. 2. c. 2. ſ. 14, 15. 3. Mod. 244. Hob. 12. Latch, 252. 1. Vent. 32. 3. Mod. 244. Ld. Ray. 152. 577. 805. 933. 12. Mod. 406. 511. Stra. 695. 3. Term Rep. 323.

(*a*) 1. Salk. 34.

And

POWELL, *Juſtice*, added, that although in that caſe the libel laid the contract to have been *ſuper altum mare*, yet the Court took notice of it as done at *Rotterdam*; but being in the voyage, and occaſioned by a diſtreſs at ſea, it was held well enough within their juriſdiction. The *hypothecation* of ſhips is abſolutely neceſſary for the preſervation of navigation; for the maſters have nothing elſe to get credit with, and the admiralty is the only court that can give them remedy: if a ſhip in HARBOUR here in *England* be *hypothecated*, they ſhall not ſue for it here. The maſter cannot at any time *jell*, but he may *hypothecate* in the voyage for neceſſaries (*a*).

JONES *againſt* SHEPHEY.

But the libel being againſt *the ſhip* and *the party*, the Court ſaid, they would ſend *a prohibition* as to him, unleſs *quatenus* it is neceſſary to make him *the party* towards the condemnation of *the ſhip*.

If the admiralty proceed againſt both *the owners* and *the ſhip*, a prohibition lies as to the owners. S. C. 2. Ld. Ray.

And ſo it was done.

984. 6. Vin. Abr. 523. 2. Term Rep. 79. 3. Term Rep. 270.

(*a*) See Menetone *v.* Gibbons, 3. Term Rep. 267. in which it is determined, on the authority of this caſe, that the court of admiralty have cognizance of an hypothecation bond given in the courſe of a voyage, though it be executed on land, and *under ſeal*; and by the caſe of Ladbroke *v.* Cricket, where the court of admiralty have given a ſentence, it ſhall be taken that they had juriſdiction, unleſs the contrary appear on the face of the proceedings. 2. Term Rep. 649.

* Day *againſt* Muſket.

Caſe 96.

TRESPASS in the time of king *William the Third*; and ſo laid with a *contra pacem* of the preſent *Queen Anne*.

Treſpaſs laid in the time of *king William*, and *againſt the peace* of *queen Anne*, is bad on demurrer, but good after verdict. S. C. 2. Salk. 640. S. C. 2. Ld. Ray. 985. 22. *Edw.* 4. pl. 24. Latch, 160.

This was ſaid to be a deſcription of the treſpaſs, and an impoſſible one, and therefore not good.

Againſt which was quoted 1. *Sid.* 253. that treſpaſs in two kings reigns ought of right to be laid *contra pacem* of both; but, however, that was but form.

POWELL, *Juſtice*, quoted the caſe of *Melwood v. Leach* (*b*), where it was held fatal.

THE COURT ſaid, that many actions upon the caſe for miſfeazance are laid *contra pacem*, and that it is not wrong to do ſo, as in actions for nuiſance.

And at another day THE COURT ſaid, that the omiſſion of *contra pacem* might be but form, but being put in as *a deſcription* of the treſpaſs, which is repugnant, though it would be well after verdict, yet being on demurrer, it was therefore fatal (*c*).

The plaintiff had leave to *diſcontinue* upon payment of coſts (*d*).

(*b*) Hilary Term, 7. *Will. and Mary*, in the king's bench. 1. Ld. Ray. 38.

(*c*) See the caſe of Rex *v.* Lookup, where an indictment alledging perjury in the time of *George the Second*, and concluding *contra pacem* of *George the Third*, was, for this reaſon, held erroneous by THE TWELVE JUDGES. 3. Burr. 1903.

(*d*) By 16. and 17. *Car.* 2. c. 8. ſ. 1. and 4. and 4. *Ann.* c. 16. ſ. 1.

Caſe 97.

Batterſby *againſt* Marſh.

Abatement to an addition of "*gentleman.*" Poſt. 105. 1. Lut. 238. Ray. 449. 5. Mod. 364. Skinner, 15. Ld. Ray. 849. 859. 1179. 1541. 8. Mod. 91. 12. Mod. 249. 3. Peer Wms. 65. Comy. Rep. 371. Strange, 556. 816.

THE PLAINTIFF in his bill declared, and called himſelf *a gentleman:* the defendant pleaded in abatement, that he was no *gentleman:* to which plaintiff demurred.

PER CURIAM. The plea is good, being confeſſed by the demurrer.

But it being after *general imparlance*, they put him to anſwer over.

Caſe 98.

Brough *againſt* Perkins.

In an action againſt *the drawer* of an *inland* bill of exchange, it is not neceſſary to ſet forth *a proteſt*; for the ſtatute 9. and 10. *Will.* 3. c. 17. does not deſtroy *the action* for want of a proteſt, but only deprives the party from recovering *intereſt* and *coſts*; and therefore if *the drawer* ſuſtain damages for want of a *proteſt*, they ſhall be borne by *the holder.*

* [81]

S. C. 1. Salk. 131. S. C. 3 Salk. 69. S. C. Holt, 121. S. C. 2. Ld. Ray. 992. Ante, 29. Ld. Raym. 743. 12. Mod. 309. 345. Bull. N. P. 278. Bayley on Bills, 40. 45.

WRIT OF ERROR of a judgment upon *nil dicit* in the court of common pleas, in an action brought againſt *the drawer* of an *inland bill* of exchange.

RAYMOND objected, that ſince the ſtatute of 9. and 10. *Will.* 3. c. 17. no damages ſhall be recovered againſt *the drawer* upon a bill of exchange without *a proteſt*, and therefore the action lies not, here being none.

HOLT, *Chief Juſtice.* The ſtatute never meant to deſtroy the action for want of *a proteſt*, but only to deprive the party from recovering *intereſt* and *coſts* upon an *inland bill* againſt *the drawer* without notice of non-payment by proteſt; for before the ſtatute there was this difference between *foreign bills* and *inland bills* of exchange: if a bill were foreign, one could not reſort to the drawer for non-acceptance or non-payment without a proteſt, and reaſonable notice thereof; but in caſe of inland bills, there was no occaſion for a proteſt; but if any prejudice happened to the drawer by the non-payment of the drawee, and that for want of notice of non-payment, which he to * whom the bill was made ought to give, the drawer was not liable; and the word "damages" in the ſtatute was meant only of the damages that the party is at in being longer out of his money by the non-payment of the drawee, than the tenor of the bill purported, and not of damages for the original debt: and the proteſt was ordered for the benefit of the drawer; for if any damages accrue to the drawer for want of a proteſt, that ſhall be borne by him to whom the bill is made; and if no damages accrue to him, then there is no harm done to him. A proteſt is only to give formal notice that the bill is not accepted, or if accepted, that it is not paid; and if in ſuch caſe the damage amount to the value of the bill, there ſhall be no recovery, but otherwiſe he ought not to loſe his debt: but that ought to appear either in evidence upon *non aſſumpſit*, or by ſpecial pleading. The act is very obſcurely and doubtfully penned, and we ought not by conſtruction upon ſuch an act to take away a man's right.

THE WHOLE COURT were of the ſame opinion.

ANO-

ANOTHER EXCEPTION was, that the *writ of inquiry* in the common pleas is returnable *quinden' Martini*, which is always on the twenty-fifth of *November*, a fixed day, and it is returned as executed the twenty-fifth of *November* laſt; that is, on the day on which it is returnable, and that is a contradiction.

A *writ of inquiry* may be executed on the day of its return.

Poſt. 148. 159. 189. 250. Carth 70. 362. 371. Fort 372. 2. H. Bl. Rep. 29. and ſee the caſe of Harvey v. Broad, 6 Mod. 148. 159. 196. 250.

But by HOLT, *Chief Juſtice*, though a writ be returnable on ſuch a day, yet they never come in until the *quarto die poſt*, and a writ may be executed on the day of its return.

AND HE AGREED, that they muſt judicially take notice on what day *quinden' Martini* falls, becauſe they muſt take notice of *Feſtum Sancti Martini*, and on what day it is, and THE ALMANACK is part of the *law of England:* and ſo of *annus biſſextilis:* and that it would be the ſame in caſe of moveable Feaſts; for the diverſity between fixed and moveable Feaſts is ridiculous; for if we judge of fixed Feaſts by THE ALMANACK, as the book that takes the diverſity admits, why not of the other? But THE ALMANACK to go by is that which is annexed to THE COMMON-PRAYER-BOOK.

The Court will take notice on what day *quinden' Martini* falls; and THE ALMANACK is legal evidence of it.

1. Leon. 242. Ante, 41. Poſt. 148. 160. 252. 1. Leon. 242. 10. Mod. 105.

And the judgment was affirmed by the whole Court.

Salk. 626. Ld. Ray. 4. 281. 870. 1557.

Preſgrove *againſt* Saunders.

Michaelmas Term, 1. *Anne, Roll.* 467.

Caſe 99.

REPLEVIN for ſeveral things: As to ſome, the defendant pleaded *property in himſelf*, and to others *property in a ſtranger*, in bar.

In REPLEVIN, "property in a "ſtranger" may be pleaded *in bar* or in *abatement*.

It was objected, that *property in a ſtranger* could not be pleaded in bar (*a*).

But HOLT, *Chief Juſtice*, ſaid, that he remembered to have heard HALE make the difference, that if *property* be pleaded in the defendant, it may be either pleaded in *bar* or *in abatement*, but if in ſtranger only in *abatement*; but that upon great deliberation it had been held ſince, that there is no difference at all, for both may be pleaded *in bar*, according to the caſe of *Sackild v. Sheton* (*b*).

S. C. 1. Salk. 5. S. C. Holt, 562. S.C. 2. Ld. Ray. 914. Poſt. 103. Ante, 69. 31. *Hen.* 6. 12. 1. Salk. 5. 94. Ld. Ray. 217. 984.

And judgment was given, that the plaintiff *nil capiat per billam*, and a return was awarded PER CURIAM.

2. Lev. 92. 1. Salk. 94. 1. Leon. 42. 1. Show. 401. 5. Com. Dig. "Pleader" (3. K. 12.). 1. Rec. Abr. 14, 15.

(*a*) 1. Vent. 149. 2. Lev. 92. (*b*) Cro. Jac. 519.

* [82]

* Robiſon *againſt* Calwood.

Caſe 100.

DEBT upon bond for performance of an award; the condition was to ſtand to, &c. ſo as it be ready to be delivered at ſuch a time; "*no award*" was pleaded; and an award ſet forth, but it was not ſaid, that it was ready to be delivered at the time.

Pleading that an award was *made*, implies that it was *ready* to be delivered.

1. Salk. 69. 75. Poſt. 160. 1. Cro. 541. 1. Keb. 739. 1. Lev. 133. 2. Ld. Ray. 989. Kyd on Awards, 195.

ROBISON *againſt* CALWOOD.

HOLT, *Chief Juſtice.* As ſoon as the award was made it was ready to be delivered, and ſo I remember it has been adjudged.

But the judgment was ſtayed upon another exception.

Caſe 101. William *againſt* Farrow.

If a *feoffment* be pleaded in ſatisfaction of *a bond*, the acceptance muſt be laid in the county where *the feoffment* was made. Carth. 238. 347. 2. Lev. 165. 12. Mod. 85. Ld. Ray. 122. Stra. 426. 573. 625.

DEBT upon bond laid in *London*; and a feoffment of land in another county in ſatisfaction thereof, and the acceptance thereof in ſatisfaction in the ſame vill was pleaded in bar: to which there was a ſpecial demurrer, becauſe the acceptance was not laid in *London.*

PER CURIAM. They muſt lay the acceptance where the feoffment was, it being local; but if it had been a tranſitory matter, it would not have made it foreign by his plea: and when ſuch plea is local, it ought not to be accepted without *oath* of the truth of it.

The plaintiff had leave to *diſcontinue* upon payment of coſts.

Caſe 102. Lamb *againſt* William.

Hilary Term, 2. Anne, Roll.

An attorney may enter a *remittit damna*, but not a *retraxit.* S.C. 1. Salk. 89. 7. Mod. 82. 8. Co. 58. 1. Roll. Abr. 584.

AN action was brought in the court of common pleas upon ſeveral damages: the attorney entered a *remittit damna* as to ſome. And, upon writ of error, it was held that the attorney could well do it, though he could not enter *a retraxit*, for that muſt be done in perſon.

Caſe 103. Vaughan *againſt* The Company of Gun-Makers in London.

A *mandamus* does not lie to the Gun-makers Company to reſtore a member to the office of "*approver of guns.*" S.C. 2. Ld. Ray. 989. Ante, 18. 1. Vent. 143. 1. Will. 11. 1. Stra. 696. 1. Bl. Rep. 667. 2. Burr. 1000.

RICHARDSON moved for *a mandamus* to reſtore *Vaughan* to his place of *approver of guns*, and ſetting his mark of approver upon the guns made by THE COMPANY.

And he ſaid, that ſelling guns not marked was a forfeiture of their charter, and that by a bye-law made by them they had appointed him an approver, but had now turned him out.

PER CURIAM. It is a thing in which the publick is no way concerned, nor is there any public law for it, therefore it is out of the reaſon of a *mandamus*; but your way will be to petition the queen, and ſhe perhaps will order THE ATTORNEY GENERAL to bring a *quo warranto* againſt them *(a)*.

Dougl. 506. 1. Term Rep. 146. 331. 2. Term Rep. 259. 4. Term Rep. 125.

(*a*) See ante, 18. 1. Vent. 143. Stamp's Caſe, 1. Sid. 40. Rex *v.* Guardians of the Poor of Canterbury, 1. Black. Rep. 667. Rex *v.* Biſhop of Cheſter, 1. Term Rep. 396. Rex *v.* Mayor of Colcheſter, 2. Term Rep. 259.

Morley

* Morley *againſt* Stacker. Caſe 104.

A WARRANT of a juſtice of peace was given to the defendant to levy money by diſtreſs, againſt one convicted of *deer-ſtealing*, according to a late act of parliament *(a)* againſt deer-ſtealers.

If a conſtable, under a warrant of diſtreſs, levies and *ſells* goods, but afterwards, underſtanding that he had no right to ſell, and on the party refuſing to indemnify him, he undoes the ſale, and reſtores the money to the buyer, and the goods to the owner, THE COURT will not grant a *mandamus* to compel him to pay the money.

In purſuance whereof he diſtrained the party's cattle, and ſold them for ſo much abſolutely; but before he paid the money, he was adviſed that it was dangerous for him to ſell the cattle, for it was doubtful whether the words of the act warranted a ſale: upon this he went to *Morley*, and proffered him the money if he would ſecure him harmleſs, which *Morley* refuſed to do: whereupon he undid the bargain, and reſtored the money to the buyer, and the cattle to the firſt owner.

And now *a mandamus* was moved for to compel him to pay the money to *Morley*; and this was the more ſtrongly inſiſted on, for that they could not charge him in any action without giving the warrant in evidence, which was out of their power in his cuſtody.

And PER CURIAM.—FIRST, It has been ſolemnly reſolved in the caſe of *The King v. Speed (b)*, that theſe words in an act of parliament, "*to be levied by diſtreſs*," muſt be underſtood of "*diſtreſs and ſale.*"

A ſtatute directing a penalty to "be levied by *diſtreſs*" means by diſtreſs *and ſale*. Poſt. 214. 1. Salk. 147. 1. Roll. Rep. 76. Noy, 17. 2. Jones, 25. 1. Brownl. 41.

SECONDLY, That a copy of the warrant would be good evidence in this caſe.

Copy of a warrant good evidence.

THIRDLY, If an officer, who has power to ſell, ſells upon credit when he may ſell for ready money, he is thereby immediately charged to the party for whom the ſale was.

Goods diſtrained cannot be ſold upon *credit*.

FOURTHLY, That in a doubtful caſe it is hard to make an officer ſell at his peril.

Diſtreſs in doubtful caſe.

NOTE, In this caſe, after the warrant iſſued out, *a certiorari* was brought, and the record thereby removed up hither, and that could not hinder the execution; as if a *writ of error* come to the court of common pleas after execution ſued out, the return of the writ of execution muſt be in the common pleas; and if goods be taken in execution before the writ of error allowed, after the record is returned here above, a *venditioni exponas* ſhall go out of the common pleas.

A *certiorari* to remove a conviction, iſſued after the *warrant of diſtreſs*, does not ſuperſede the execution. Ante, 33. 40. 43. Poſt. 206. 208.

FIFTHLY, That if in this caſe the warrant be not made returnable, the officer is not bound to return it.

A warrant of diſtreſs need not be returned.

(*a*) 3. and 4. *Will. and Mary*, c. 10. S. C. 12. Mod. 328. S. C. 1. Ld. Ray. 583.
(*b*) 1. Salk. 379. S. C. Carth. 502.

SIXTHLY,

Warrant of diſtreſs made returnable muſt be returned, though the conviction be removed.

SIXTHLY, If the juſtices made the warrant returnable before them, though the record of conviction be afterwards moved hither by *certiorari*, yet they call the conſtable to account upon the warrant.

If a diſtreſs under a penal ſtatute be begun, a removal of the conviction by *certiorari* ſhall not impede the completion of it; for if wrong, THE SESSIONS may fine the conſtable if he do not return the *warrant*.

SEVENTHLY, If, before *certiorari* comes, execution be done in part, he may, notwithſtanding the *certiorari*, go on with it; as if execution be out of the common pleas, and goods be ſeized before *writ of error* allowed, notwithſtanding the *writ of error*, they may proceed to ſale. If this were the caſe of a ſheriff, we would compel him to make a return, and would leave the party to his remedy upon the return: and if a conſtable will not return his warrant, the ſeſſions may fine him; * which indeed is no remedy or ſatisfaction to the party; and the miſchief is the ſame in caſe of a ſheriff, for if he will not make a return to a *fieri facias*, the Court can only amerce him.

* [84]

And THE COURT would not grant *a mandamus*, but left the plaintiff to that remedy; for if we ſhould grant *a mandamus*, and he diſobey it, we could only fine him for *the contempt*; and the juſtices of peace may do it as well.

Caſe 105.

Anonymous.

If a releaſe be pleaded, but no *venue* laid, it cannot be amended after demurrer, and joinder entered on THE ROLL. Ante, 38. Poſt 88.

A RELEASE was pleaded to a *writ of error*, but no *venue* laid to try it; and there was a demurrer, and joinder in it, and all entered on THE ROLL; but THE ROLL was not brought into court, or put upon the book of rolls.

EYRE now moved to amend it.

But PER CURIAM, It cannot be, for it is now a record by being put on THE ROLL; but if it had been *in paper*, it might be amended, upon payment of coſts.

Caſe 106.

Lord Banbury *againſt* Woods.

Pleadings in abatement to a writ of *homine replegiando*. Salk. 5. 6. Mod. 84. 3. Salk. 20. Holt, 41. S. C.

LONDON, *to wit.* THOMAS WOODS, *merchant*, and *Mary* his wife, were attached to anſwer *Charles Earl of Banbury* and *Mary Counteſs of Banbury* his wife, in a plea, why they took the ſaid counteſs, and her ſo taken detain, &c. And whereupon the ſaid earl and counteſs by *Richard Longford* their attorney complain, that the ſaid *Thomas Woods* and *Mary* his wife, on the twentieth day of *April*, in the ſecond year of the reign of our lady *Anne*, now queen of *England*, &c. at *London* aforeſaid, to wit, in the pariſh of *St. Helen* in the ward of *Biſhopſgate*, the ſaid counteſs took, and her ſo taken do yet hold and detain: wherefore they ſay they are injured, and have damages to the value of ten thouſand pounds: and they bring this ſuit, &c.

And

Lord Banbury against Woods.

And the ſaid *Thomas Woods* and *Mary* his wife, by *Richard Aſh* their attorney, come and crave *oyer* of the original writ aforeſaid, and of the return of the ſame writ; and they are read to them in theſe words, to wit, *Anne*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, queen, defender of the faith, &c. to the ſheriffs of *London*, greeting. Whereas we have oftentimes commanded you, that you ſhould juſtly and without delay replevy *Mary* the wife of *Charles Earl of Banbury*, whom *Thomas Woods* merchant, and *Mary* his wife took, and her ſo taken do detain, as it is ſaid, unleſs ſhe was taken by the ſpecial command of us, or of our chief juſtice, or for the death of any perſon, or for our foreſt, or for any other guilt, wherefore according to the cuſtom of *England* ſhe is not repleviable, leſt we ſhould further hear claim thereof for defect of juſtice; or that you would ſignify to us the cauſe why you would not or could not execute our mandate formerly to you thereupon directed: and you deſpiſing our ſaid precepts, as we have been informed, have not hitherto taken care to replevy the ſaid *Mary* the wife of the ſaid earl, or to ſignify unto us the cauſe why you would not or could not do it; in manifeſt contempt of us and our mandates, and to the great damage and grievance of them the ſaid earl and counteſs, whereat we very much wonder and are moved: ſtill we command and firmly enjoin you, that you replevy the ſaid *Mary* the wife of the ſaid earl, according to the tenor of our ſaid mandates, to you before directed for that purpoſe, or that you yourſelves be before us from the day of *St. Michael* in one month, whereſoever we ſhall then be in *England*, to ſhew why our ſaid mandates ſo often to you directed, you have contemptuouſly refuſed to execute; and have you there this writ. Witneſs Ourſelf at *Weſtminſter*, the twenty-ſecond day of *June*, in the ſecond year of our reign (*Cæſar*). By virtue of this writ to us directed, we do certify, that no other writ or mandate of our ſaid lady the queen, of replevying the within-named *Mary* the wife of *Charles Earl of Banbury*, whom the within-named *Thomas Woods* and *Mary* his wife have taken, and her ſo taken do retain, as within ſpecified, that the writ of *pluries replevin* of the ſaid *Mary* the wife of *Charles Earl of Banbury*, came to our hands, or was delivered to us. And further we do certify to the ſaid lady the queen, that the ſaid *Mary* the wife of *Charles Earl of Banbury* is removed afar off to places to us unknown, by the ſaid *Thomas Woods* and *Mary* his wife, wherefore we cannot replevy the ſaid *Mary* the wife of the ſaid *Charles Earl of Banbury*, as we are within commanded. The anſwer of *Sir Gilbert Heathcote*, and *Joſeph Wolfe*, Eſquire, Sheriffs.

Which being read and heard, the ſaid *Thomas Woods* and *Mary* his wife demand judgment of the ſaid writ, becauſe they ſay, that by the form of the ſtatute the addition of the village, or hamlet, or place, and county, of the reſidence of the ſaid *Thomas*

LORD BANBURY *againſt* WOODS.

Thomas ought to be contained in the ſaid original writ of the ſaid *Charles Earl of Banbury*, and *Mary Counteſs of Banbury*, his wife: and this they are ready to verify. Wherefore becauſe ſuch addition is not contained in the ſaid writ, the ſaid *Thomas* and *Mary* pray judgment of the ſaid writ, and that the ſaid writ be quaſhed, &c.

And the ſaid *Charles Earl of Banbury* and the ſaid *Mary Counteſs of Banbury* his wife ſay, that notwithſtanding any matter by the ſaid *Thomas* and *Mary* his wife above pleaded in abatement of the writ, the writ of the ſaid earl and counteſs ought not to be quaſhed, becauſe they ſay that the plea aforeſaid, by the ſaid *Thomas* and *Mary* his wife pleaded in manner and form aforeſaid, and the matter in the ſame contained, are not ſufficient in law to quaſh the ſaid writ of them the ſaid earl and counteſs. To which ſaid plea they the ſaid earl and counteſs need not, neither are they in any manner bound by the law of the land to anſwer; and this they are ready to verify. Wherefore, for want of a ſufficient plea in this behalf of them the ſaid *Thomas* and *Mary* his wife, they the ſaid earl and counteſs demand judgment, and that the writ of them the ſaid earl and counteſs may be adjudged good, and that the ſaid *Thomas* and *Mary* may further anſwer to the ſaid writ, &c.

And the ſaid *Thomas Woods* and *Mary* his wife ſay, that the ſaid plea by them the ſaid *Thomas* and *Mary* in manner and form aforeſaid pleaded, and the matter therein contained, are good and ſufficient in the law to quaſh the ſaid writ of them the ſaid earl and counteſs, which ſaid plea and the matter therein contained, they the ſaid *Thomas* and *Mary* are ready to verify, as the Court, &c. And becauſe the ſaid earl and counteſs have not anſwered to the ſaid plea, nor have hitherto any ways gainſaid it, they the ſaid *Thomas* and *Mary*, as before, pray judgment of the aforeſaid writ, and that the ſame writ be quaſhed, &c.

But becauſe the Court of the ſaid lady the queen now here is not yet adviſed of giving their judgment of and concerning the premiſes, day is therefore given to the ſaid parties before the lady the queen, until . . . . . whereſoever, &c. of hearing their judgment of and concerning the ſaid premiſes, becauſe the Court of the ſaid lady the queen now here, is not yet thereof, &c.

Caſe 107.

Lord Banbury *againſt* Wood.

Michaelmas Term, 2. *Anne*, *Roll* 398.

The defendant's *addition* need not be mentioned in a *pluries homine replegiando*; for the *original* writ is *alias tertiâ*, and as ſuch writs do not require addition, it need not be in the *alias* or *pluries*. S. C. 1. Salk. 5. S. C. 3 Salk. 20. S. C. Holt, 41. S. C. 2. Ld. Ray. 987. Poſt. 115. 198. Cro. Eliz. 897. Noy, 135. 4. Mod. 347. 12. Mod. 199. 211.

A HOMINE REPLEGIANDO. The want of *addition* to *the pluries* was pleaded in abatement; and on demurrer

The queſtion was, Whether this was within the ſtatute of 1. *Hen.* 5. c. 5. of additions.

And

Lord Raymond against Woode.

And that it was, it was urged, that proceſs of *exigent* lies upon this writ; therefore it is within the very words of the ſtatute. The *exigent* lies here, and did ſo at common law; though it be not expreſsly *vi et armis*, yet it is impliedly ſo, for it is a treſpaſs and falſe impriſonment. It lies in a *writ of deceit*, though it be not *vi et armis*, upon the ſame reaſon (*a*). And the reaſon why *writs of replevin* in THE REGISTER are without *addition*, is, becauſe that book is much more ancient than the *ſtatute of additions* (*b*). But if it be objected, that there was no *capias* in *replevin* until 25. *Edw.* 3. c. 5. and 17. I anſwer, ſo it did not lie in *debt* or *covenant* until given by acts of parliament, and yet there muſt be addition.

HOLT, *Chief Juſtice*, at firſt inclined ſtrongly, that the plea was good, and would diſtinguiſh this from other *writs of replevin*; for here, he ſaid, the proceſs of outlawry iſſues immediately upon the *pluries homine replegiando*, which he affirmed to be *a withernam* in itſelf; but in *common replevin* the proceſs of outlawry is not upon the *pluries replegiari*, but upon the *capias in withernam*, which iſſues upon the ſheriff's return of *averia elongat.* upon the *pluries*; and upon the ſheriff's ſpecial return of the *capias in withernam*, that is, upon the ſheriff's return of *nulla bona* on the *withernam*, there ſhall go a *capias* againſt the perſon, and ſo to outlawry.

But POWELL, *Juſtice, contra.* There is no difference; for in both caſes the proceſs of outlawry is upon the *withernam*, and not upon the original writ; for in a *homine replegiando* there ſhall go no * *withernam* until return of the *homine replegiando*; and as the firſt *withernam* in *common replevin* muſt be *de averiis*, ſo the firſt in a *homine replegiando* ſhall be of the perſon. * [85]

And at another day THE WHOLE COURT awarded a *reſpondeat ouſter*; for though proceſs of outlawry lies in a *homine replegiando*, yet there ought to be no *addition*, for the *pluries* on which we hold plea here, is not the original in *replevin*, but the original is the *writ of replevin*, which writ is *vicontiel*: ſo if *replevin* be removed by *recordare*, though, upon *withernam* thereon, there will lie proceſs of outlawry, yet there is no addition according to the ſtatute; therefore it is not the original, and therefore out of the ſtatute.

SECONDLY, There being no *addition* to the firſt *replevin*, the *pluries*, which is indeed an original to us, muſt have none, becauſe it muſt not vary from the firſt writ; and the ſtatute of 1 *Hen.* 5. c. 5. is to be conſtrued ſtrictly. In *an aſſize*, if the *diſſeiſin* be found with force, there is *a capiatur* againſt the defendant, and proceſs of outlawry thereupon; yet becauſe it is mixed, and not a perſonal action, it is out of the ſtatute. 1. Salk. 6.

(*a*) See Year Books 11. *Hen.* 4. pl. 835. 13. 25. *Hen.* 6. pl. 6. and 2. Roll. Abr. (*b*) See 2. Inſt. 595. 665.

And

Lord Banbury *againſt* Woods.

And Powell, *Juſtice*, ſaid, There never is an *addition* to any writ that is *vicontiel*.

Per Curiam. *Reſpondeat ouſter.*

Caſe 108. Inman *againſt* Crew.

An attorney of *B. R.* or *C. B.* muſt be preſent when a perſon in cuſtody gives a *warrant of attorney*.

THE doubt was, Whether it be neceſſary that AN ATTORNEY ſhould be preſent at the executing of a warrant to confeſs judgment by one under arreſt by proceſs of an inferior court?

And it was agreed,

Poſt. 163. 1. Salk. 402. 5. Mod. 144. Ld. Ray. 345. 598. Stra. 530. 807. 882. 902. 1245. 1. Bac. Abr. 188.

FIRST, That if one under arreſt confeſs a judgment in this court in preſence of a ſworn attorney of the common pleas, it will be well, and ſo *vice verſâ* (*a*).

A warrant improperly obtained, ſhall be ſet aſide.

SECONDLY, That though an attorney be preſent, yet if there be practice in obtaining it, it will be ſet aſide (*b*).

Attorney need not be preſent if the perſon be under arreſt by proceſs of *inferior court*.

THIRDLY, If one under arreſt by proceſs of an inferior court, give a warrant for the confeſſing of judgment in that court, we will not ſet it aſide, though an attorney be not preſent.

Attorney muſt be preſent if the judgment is confeſſed in ſuperior court.

FOURTHLY, If one under an arreſt by ſuch proceſs give a warrant to confeſs a judgment in this court, if an attorney be not preſent, it will be ill (*c*).

A warrant obtained without an attorney under a colourable diſcharge, is bad.

FIFTHLY, If a man be under an arreſt, and ſeemingly diſcharged by the bailiffs, with a deſign that he ſhould give a warrant of attorney to confeſs a judgment, to ſtand though no attorney were preſent, and to retake him in caſe he did not, gives a warrant for confeſſing of judgment, it will be ſet aſide.

A warrant of attorney given under apprehenſion of being in cuſtody is bad, if no attorney be preſent.—Poſt. 163.

SIXTHLY, Though ſuch perſon be really diſcharged, yet if he have probable reaſon to believe himſelf not to be diſcharged, and under ſuch apprehenſions he give a warrant for confeſſing of judgment, it will be ſet aſide. So if under the terror of an arreſt.

(*a*) Bland *v.* Pakenham, Stra. 530.
(*b*) Dougl. 198. (186.)
(*c*) 5. Com. Dig. "Pleader," (Y. 2.)

* [86]

Caſe 109. * Wigg *againſt* Rook and his Wife.

If an attorney undertake to appear, and accept a declaration *de bene eſſe*; the plaintiff, on the attorney's refuſing to appear, cannot ſign judgment for want of a plea. Ante, 16. 42.—1. Roll. Abr. 747. 2. Salk. 86.

THE caſe upon the report of Mr. Clarke *the ſecondary*, was thus: A writ iſſued againſt huſband and wife; and an attorney, on ſight of the writ, undertook to appear for them, but after would

no

not do it: the plaintiff delivered a declaration, which *he* received *de bene eſſe*, and judgment was entered for want of a plea.

Wood *againſt* Rook and his Wife.

THE COURT ſet aſide the judgment for *irregularity*, but ordered THE ATTORNEY to be laid by the heels.

AND IT WAS SAID, That if an attorney undertake to appear, and afterwards will not do it, upon ſummons before a judge, he ſhall be compelled to do it; for that an attorney to undertake to appear, and not to do it after, is *a contempt* of the Court.

An attorney who undertakes, may be compelled to appear.

"Pleader," (B.) (B. 3.) 5. Com. Dig. 2. Lev. 38.

In an action againſt huſband and wife, if the huſband will order an appearance for himſelf, it will not be received without an appearance for the wife too (*a*).

In an action againſt huſband and wife, the *huſband* muſt file appearance for his *wife*. Ante, 17. Poſt. 105.—1. Lev. 216. 2. Bl. Rep. 720. 1. Salk. 115. 2. Stra. 1272. 1. Term Rep. 486. 5. Com. Dig. "Pleader," (B. 4.)

(*a*) See Clark *v.* Norris and his Wife. 1. H. Bl. Rep. 235.

Jevon *againſt* Turner.

Caſe 110.

TWO *ſcire facias* were taken out with the ſame *teſte*, but different returns; the one returnable in *quindena Hilarii*, and another *craſtino Purificationis*.

Two *ſcire facias* of the ſame *teſte* ill.

Carth. 468.

Though there were different returns, and at convenient diſtance, yet becauſe they were actually taken out at one time, IT WAS JUDGED wrong; for PER CURIAM, Thus the party would loſe the benefit of two *ſcire facias*, which the law gives him.

Anonymous.

Caſe 111.

A *SCIRE Facias* to revive a judgment againſt an executor, mentioned firſt a day of appearance *coram nobis ubicunque*; but after gave day to the party to appear "*at the day aforeſaid at* "WESTMINSTER."

Where the firſt *ſcire facias* returnable *ubicunque*, the ſecond *ad diem apud Weſtm.*

It was now moved to amend it.

But THE COURT ſaid, that it being in the writ, they could not do it of grace or favour, but would give day to ſhew cauſe why it ſhould not be amended, *ex merito juſtitiæ*.

And the plaintiff for his expedition moved to quaſh it.

Horner *againſt* Bonner.

Caſe 112.

PROHIBITION was moved for upon the ſtatute of 2. & 3. *Edw.* 6. c. 13. for ſuing for tithes of barren ground newly cultivated.

Prohibition for tithes of barren ground newly cultivated, refuſed.—S. C. Poſt. 96. 2. Ld. Ray. 991. Bunb. 159. 2. Inſt. 656.

But IT WAS DENIED for two reaſons:

FIRST,

Horner *against* Bonner.

FIRST, Becauſe the ſuggeſtion did not alledge it to be *ſuapte natura ſterilis.*

SECONDLY, That there was no affidavit that it was pleaded below.

Caſe 113. Anonymous.

If party die after warrant to confeſs judgment, &c.
8. Mod. 77.
2. Barnes, 218. 223.

PER CURIAM. If a man give a warrant of attorney to confeſs judgment the firſt day of Term, and die, it may be well entered any time that Term, according to *Shelly's Caſe* (*a*), and the *Dean of Saliſbury's Caſe* (*b*), and many other caſes.

(*a*) 1. Co. 93. (*b*)

Caſe 114. Anonymous.

An indictment will not lie for ſelling ale without licence.
1. Salk. 134.
Show. 398.
3. Mod. 144.
7. Co. 36. Ld. Ray. 882. 10. Mod. 337. 12. Mod. 104. 446. Fitzg. 47. 65. Stra. 828.
2. Burr. 801. 834. 2. Hawk. P. C. c. 25. ſ. 4. 2. Hale, 171.

IT was ſaid to have been reſolved in the caſe of *the Queen v. Watſon* (*a*), two years ago, in this court, and alſo in one *Caſtle's Caſe* (*b*), that where an act of parliament gives a *particular penalty*, the party ſhall not be puniſhed by *indictment:* in this caſe, the *indictment* was for ſelling ale without licence, and it was quaſhed *niſi* (*c*).

(*a*) 1. Salk. 45. See 2. Burr. 803.
(*b*) Cro. Jac. 643. See 2. Burr. 803.
(*c*) See the caſe of Rex *v.* Marriott, 1. Show. 398. 402. S. C. 4. Mod. 144.

* [87]

Caſe 115. * The Queen *againſt* Glin and Another.

Juſtices of peace cannot delegate their authority to others, to make rates and orders, &c.
S. C. Sett. & Rem. 217.
Ante, 77.
Poſt, 97.
1. Roll. Ab. 382.
2. Salk. 436. 489. 493. 674. 699. 701.
2. Hawk. P. C. ch. 1. ſ. 9.
1. Bott's P. L. 312. pl. 381.
Ld. Ray. 55.

THE defendants were indicted for not producing the pariſh books of rates (*a*) before certain juſtices of peace appointed by the reſt to examine and make orders thereupon, and for diſobeying ſuch orders.

And it was excepted, that this was a delegation of their authority, which they could not do; for though it were agreed, that they might appoint ſome of themſelves to examine and ſtate the matter to them, and then they to make order thereupon, yet ſure they cannot delegate the power of making orders.

A SECOND EXCEPTION was, that notice of the order was not alledged.

HOLT, *Chief Juſtice.* I am not ſatisfied that they can ever refer the examination of the matter to a certain number of themſelves, becauſe they are all judges of the fact, and therefore they tranſact it as judges in court; but allow that they may refer the

(*a*) See 17. Geo. 2. c. 38.

examination

examination of the fact, and reſerve the judgment to themſelves, yet doubtleſs they cannot give a power to make rates and orders.

THE QUEEN *againſt* GLIN AND ANOTHER.

And it was quaſhed.

The Pariſh of Cunmer *againſt* The Pariſh of Milton. Caſe 116.

A CHILD was born at *Cunmer*; and the father, while the child was under ſeven years of age, removed to, and gained a ſettlement in *Milton*; and THIS WAS HELD a ſettlement for the child.

A *child* follows his *father's* ſettlement. S.C. 2. Salk. 528. S.C. 3. Salk. 259. S. C. Holt, 578. S. C. Sett. & Rem. 239 242. S. C. Fort. 322.

And it was ſaid by THE COURT, that if a father be ſettled in a pariſh, and dies, and after his wife dies in childbed, he ſhall be there ſettled.

Bennoyer's Caſe. Caſe 117.

PER CURIAM. If proceedings be *ex officio* in the ſpiritual court; yet if they do not give a copy of *the articles*, they ſhall be prohibited *quouſque*; notwithſtanding the reſolution in *Moore*.

A prohibition lies, if the ſpiritual court refuſes a copy of articles. Poſt. 308.

And THE COURT granted prohibition.

1. Show. 158. 172. 1. Roll. 80. 2. Roll. 318. 1. Sid. 65. 332. 7. Mod. 148. 1. Vent. 5. Raſt. 364. 6. Com. Dig. "Prohibition," (F. 15.)

The Queen *againſt* Browne. Caſe 118.

BROWNE was indicted at *Hull* for forging a cocket for *quinque ſarcinas lini*, ANGLICE *five packs of linen cloth*; and this was removed up by a *certiorari*.

An indictment for forging A COCKET for *five packs of linen cloth* is ſufficiently certain.

And, after trial, a motion was made in arreſt of judgment, for that it was too uncertain.

But it was urged that much ſtronger caſes than this have been adjudged good, as "*duas ſarcinas canapis*, ANGLICE, *two bundles* "*of hemp*" (*a*), for "a parcel of thread" (*b*), "trover for a ſtudy of "books" (*c*), for it is enough ſufficiently to deſcribe the thing in which they were contained.

S.C. 3. Salk. 172. Hard. 111. 1. Salk. 130. 283. 2. Salk. 654. 2. Term Rep. 708.

HOLT, *Chief Juſtice*. Detinue lies for "a box of writings," and if any of them concern lands, it will be prudent to name it, for that ſhall ouſt the defendant of his *wager of law*; but it ſuffices that the thing in which they are contained be certain enough; and if any new action be brought, the defendant ſhall ſay, that a former action was brought for the ſame by the name of ſo many bundles, &c.

And THE QUEEN had judgment.

(*a*) 2. Lev. 125.
(*b*) 1. Lev. 303.
(*c*)

Caſe 119.

* Garden *againſt* Exon.

A defendant ſhall not have coſts upon a judgment in his favour on a *demurrer* to a plea in *abatement*.

PER CURIAM. There ſhall be no coſts for a defendant upon judgment upon a *demurrer* to a plea in *abatement*; for the ſtatute 8. and 9. *Will.* 3. c. 11. ſ. 2. is to be intended of a judgment upon demurrer upon the merits of the caſe; for if there were judgment of *reſpondeas ouſter* for plaintiff, he ſhould have no coſts; *idem a pari*: and the caſe of *Thomas v. Lloyd* (*a*) was quoted, where the ſame had been reſolved before.

S. C. 1. Salk. 194. S. C. 2. Ld. Ray. 992. Poſt. 198.

(*a*) 1. Salk. 194. S. C. 1. Ld. Ray. 336. Same point, 12. Mod. 583. 609. Gilbert's C. P. 268. See alſo Hullock on Coſts, 149. 3. Com. Dig. 3d edit. 842. Cook *v.* Sayer, 1. Burr. 753. Aſtley *v.* Young, 2. Burr. 1232. Yates *v.* Guner, Barnes, 141. and Thrale *v.* Biſhop of London, 1. H. Bl. Rep. 530.

Caſe 120.

Anonymous.

Wife indicted by huſband, admitted *in forma pauperis*.

A *FEME COVERT* was indicted by her huſband for poiſoning his cows with bruiſed glaſs put into their grains; and ſhe was admitted *in formâ pauperis*; though THE COURT ſaid, the huſband could not convict her.

Stra. 1041. 4. Com. Dig. "Forma Pauperis," (A.)

Caſe 121.

Anonymous.

It is a contempt to charge a priſoner, in execution for *a fine*, with a *civil action* without leave of Court.

PER CURIAM. If a perſon be in execution for *a fine*, it is *a contempt* for any to charge him with *a civil action* without leave of the Court; but the Court will hardly diſcharge the action, though they will puniſh the contempt.

Caſe 122.

Anonymous.

Order of removal. 2. Salk. 491. 514.

PER CURIAM. It is a good cauſe in an order of removal to ſay, that the party is "*likely to become chargeable* to the "pariſh" (*a*), or that "he does not rent a tenement of ten pounds "a-year" (*b*).

(*a*) The pauper being likely to become chargeable, muſt be in *the adjudication* of the order, and not in *the recital* only, except ſo averred by the juſtices, The Queen *v.* the Inhabitants of Rockville, Trin. 12. Ann. Sett. & Rem. 15. 2. Bott P. L. 775. It muſt be directly ſo averred; "THEREFORE are likely to "become chargeable, *as we are credibly* "*informed*," is ill, Reg. *v.* Great and Little Waltham, Eaſter 1721. Sett. & Rem. 24. 2. Bott, 774. So "WHERE-"AS *J. S.* is likely to become charge-"able," not ſaying to what *pariſh*, is ill, The Queen *v.* the Inhabitants of Bradford, Trin. 1711. Sett. & Rem. 194. "Whereas *J. S.* intruded into *Reyden*, "and was laſt legally ſettled at *Hendon*," is ill, it not being ſaid he was likely to become chargeable, Hil. 1712. NOTE *to the former edition.*

(*b*) As to the point of renting ten pound *per ann.* ſee Rudwick and Cheddingford, Mich. 1710. Rex *v.* the Pariſh of Farnham, in the ſame Term. Rex *v.* the Pariſh of Sedgemore, Eaſter T. 1711. Rex *v.* St. Saviour's Southwark, Mich. 1714. Rex *v.* North Dibley, Sett. & Rem. 86. 2. Bott P. L. 165. Rex *v.* St. Mary Guilford and Cranley Hill, 1721. Stra. 502. Rex *v.* St. John's Ampwell, Trin. and Mic. 1722. Stra. 529. NOTE *to former Edition.*

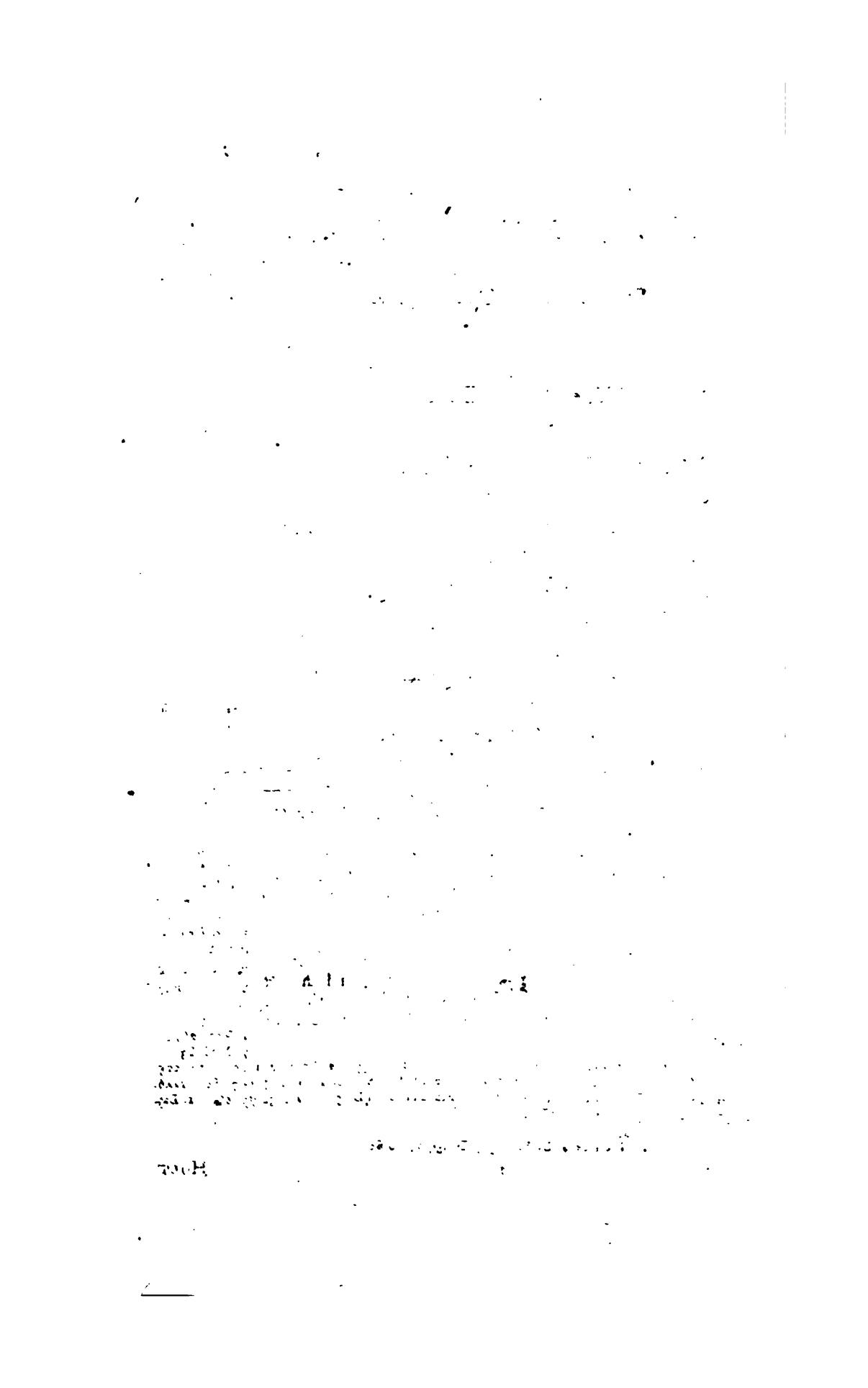
Anony-

Anonymous. Case 123.

PER CURIAM. The juſtices may remove any man that does not rent ten pounds a-year, let him be worth ever ſo much; for his having *a freehold* of his own is foreign; and if he has any, it ought to come of his ſide upon the appeal (*a*).

A pauper cannot be removed from his freehold.

(*a*) But ſee Rex v. St. Mary, Berkhamſted, 2. Bott P. L. 629. and Rex v. Aythorp Rooding, Burn. S. C. 422. 2. Bott P. L. 634. and the ſtatute 9. *Geo.* 1. c. 7. 2. Bott P. L. ch. 10. page 623. to 697.



HILARY TERM,

The Second of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Powell, *Knt.*
Sir Thomas Powis, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

---

* The Queen *againſt* Guy.

Caſe 212.

A MANDAMUS was directed to the official of —— to *ſwear in A.* and *B.* churchwardens of the pariſh of ——. To this a return was, that they were "*not duly choſen*" (*a*).

A mandamus lies to the ſpiritual court to ſwear in churchwardens; and it cannot be returned that they were *not duly choſen*; but if there is matter of doubt, a *ſpecial return* muſt be made.

S. C. 3. Salk. 88. S. C. 2. Ld. Ray. 1008. Poſt. 97. 1. Vent. 267. 7. Mod. 83.

And now a rule was made for a *peremptory mandamus*, for he ſhould have complied with the writ as far as he could, and have ſworn one of them, if the truth were that one of them only had been duly choſen, or elſe have returned that neither of them was choſen.

But it was objected, that this could not be done; for by the cuſtom of the pariſh the parſon was to chuſe one, and the pariſhioners the other: and the pariſhioners inſiſted on it, that they ſhould chuſe two, and did propoſe two, and the official could not tell which of them two to ſwear.

1. Salk. 431. Cro. Car. 551. 1. Lev. 75. 1. Ld. Ray. 138. 559. 2. Ld. Ray. 1200. Stra. 825. 1. Mod. 338. 10. Mod. 12. 22. 11. Mod. 221. 12. Mod. 116. Stra. 52. 225. 609. 686. 1246. 1. R. H. 130. 3. Burr. 1422. 5. Com. Dig. "Mandamus" (D. 5.). Dougl. 79. 85. 2. Bac. Abr. 371. Cowp. 413. 2. Term Rep. 456.

(*a*) See Rex v. Lyme Regis, Dougl. 79. to 86.

THE QUEEN *against* OUT.

HOLT, *Chief Juſtice.* Then you ſhould have made a *ſpecial return*, that the pariſh claims a right to chuſe two; that theſe perſons had an equal number of voices; that the parſon had choſen his man, and ſo you could not ſwear either of the pariſhioners' men: or if the pariſh unanimouſly choſe two jointly, when in truth they had a right but to chuſe one, that would be void as to both; and in that caſe you might return generally, that neither of them had been choſen; and ſo where two have an equal number of votes.

And at laſt, by direction of THE COURT, it was conſented to, to try *the cuſtom* in a feigned action.

*[90]

Caſe 221.

* ——— *againſt* Cowper, a Juſtice of Peace.

The Court will not hear affidavits againſt a return to a *certiorari*, unleſs to prove corruption in the magiſtrate; but if the return be *falſe*, the party may bring an action on the caſe.

Ante, 30. *Poſt.* 114. 169. 178.

Stra. 63. 2. Hawk. P. C. ch. 27. § 74. 2 Bac. Abr. 339.

AN inquiſition of forcible entry was removed hither by *certiorari*, commanding the juſtices to ſend all inquiſitions of forcible entries made upon *J. S.* and the juſtices returned an inquiſition of an entry made by *B.* upon *J. S.*

And now affidavits were offered to give the Court ſatisfaction, that the only inquiſition before the juſtices was an inquiſition of a force by *A.* and that the precept was to ſummon a jury to inquire of a force againſt *J. S.* by *A.* and that they did not inquire of any other force.

PER CURIAM. We cannot hear affidavits againſt the return, which is matter of record, in order to make *reſtitution*; but we may do it in order to have an information filed againſt the juſtices for this abuſe: or, if the return be falſe, you may have your action of falſe return.

And here a day was given to ſhew cauſe why AN INFORMATION ſhould not be filed againſt them.

An inquiſition of forcible entry from a copyholder muſt find that it was *durante bene placito* and *determinable* at the will of the lord.

HOLT, *Chief Juſtice*, took this exception to the inquiſition, that it alledged the party to be ſeiſed in fee of a cuſtomary eſtate *ad voluntatem domini*, but did not ſay *dimiſſ' et dimiſſibil'*.

Caſe 222.

Garibaldo *againſt* Cagnoni.

It is a contempt knowingly to procure the arreſt of perſons going to court to plead to an indictment. 3. C. poſt. 466.

GARIBALDO came to court to confeſs an indictment for an aſſault upon *Cagnoni*, and as he was going home *Cagnoni* got him arreſted for the ſame aſſault.

Upon motion and affidavit of this matter, AN ATTACHMENT *niſi* was granted againſt him, and before the day he diſcharged *Garibaldo*.

3. C. Salk. 202. 3. C. Holt, 89. Poſt. 96. 173. 2. Vent. 11. 2. Mod. 181. Comy. Rep. 411. Strange, 936. 1094. 6. Com. Dig. "Priviledge," 475. 2. Bac. Abr. 182. Cowp. 156. 4. Term Rep. 282. 2. H. Bl. Rep. 556.

And

And now coming to ſhew cauſe, the rule was ſet aſide, becauſe the affidavit did not charge him to have *notice* that *Garibaldo* came to court to confeſs the judgment, for otherwiſe he could not be in contempt for the arreſt. GARIBALDO *againſt* CAGNONI.

Catchmade's Caſe. Caſe 127.

PER CURIAM. If a contract be for four pounds, and a plaintiff, to give an inferior court juriſdiction, will ſplit it into ſeveral actions, *a prohibition* ſhall go.

A debt of *four pounds* cannot be ſued for by *ſeveral actions* in an inferior court. 2. Sid. 464. Hob. 617. 1. Vent. 65. 73. Co. Lit. 118. a. 5. Term Rep. 64.

* The Queen *againſt* Corbett. Caſe 128.

THE juſtices of peace made an order upon the defendant, that he ſhould pay *B.* ſo much money for labour and work done, without ſo much as ſaying that he was his ſervant.

An order of juſtices to pay ſo much money for work and labour generally is bad.

And it was quaſhed: for, PER CURIAM, this might be carpenter's work, &c. and the juſtices have only power in caſes of wages of ſtatutable ſervants (*a*), *viz.* ſervants in huſbandry: and they would be very tender of quaſhing ſuch orders (*b*).

S. C. 3 Salk. 261. S. C. Sett. & Rem. 229. Poſt. 204. 1. Salk. 406. 2 Salk. 475. 680. 5. Mod. 419. Carth. 356. 1 Strange, 2. 8. Forteſ. 327. 2. Stra. 1002. 4. Com. Dig. tit. Juſtices of Peace, N. 80.

(*a*) See 5. Eliz. c. 4. ſ. 15.

(*b*) See the caſe of Reg. v. Gouche, in Michaelmas Term, 1. *Anne*, where the juſtices made an order for the payment of wages for work and labour in huſbandry, and on exception that it did not appear to be ſtatute wages, the Court ſaid, they would, in all orders of the kind, intend it within the ſtatute, unleſs the contrary appeared on the face of the order, 2 Salk. 441. See alſo Rex v. Gregory, 2. Salk. 484. Rex v. Pope, 5. Mod. 419. and Shergold v. Holloway, 2. Stra. 1002. And in the caſe of Rex v. Helling it appears, that an order generally for wages is not good, 2. Stra. 8. &c. it muſt appear to be for wages in huſbandry, 1. Stra. 475. the caſe of the King v. Clegg. And if it appear to be not for wages in huſbandry, it is clearly bad. Rex v. Iſondone poſt. 204. Rex v. Pope, 5. Mod. 419.

Sutton's Caſe. Caſe 129.

SUTTON had been marſhal of the court, and for non-attendance another was ſworn into his place, but (as the Court declared) without prejudice to his right to the office, for that was left to the law. The new marſhal, to get poſſeſſion, made a forcible entry into the priſon.

If the MARSHAL be turned out for non-attendance, and the new marſhal get poſſeſſion by force, the Court will not reſtore him on motion.

BROTHERICK moved in behalf of *Sutton*, that the Court, in regard of the power they had over their officer, would interpoſe, and quiet the poſſeſſion until the title were legally ſettled; and the rather, for that it would look diſreſpectful in him to apply to an inferior juriſdiction to have an inquiſition of *forcible entry*, and that the juſtices would hardly dare to meddle in it by reaſon of its immediate dependency on the Court: and though a new marſhal were

S. C. 1. Salk. 331. 1. Ld. Ray. 1609. 7. Mod. 92.

Dyer, 184. 2. Salk. 536.

Sowton's Case.

sworn in, yet the former was liable to all escapes of prisoners charged in his custody, and doubtless they would be many in this disorder.

CURIA. It cannot be disrespectful to us, that any should use the remedy the law gives him. And here you would have us hold plea of forcible entry by parol, whereas the Court has no original jurisdiction of forcible entry: *et currat lex*, for it is a question of right between two contending officers. And as to the inconveniency of escapes, the Court said, that he was so used to suffer voluntary escapes, that they could not imagine he feared any danger that way.

*[92]

Case 130.

Jenkins and his Wife *against* Plombe.

If a wife be made executrix, and husband and wife bring an action *as executor* for money had and received to their use in right of the wife *as executrix*, yet they shall pay *costs* on being *nonsuited*; for the receipt being since the death of the testator, the cause of action arose in their own time, and it was not necessary in this case to name the wife executrix.

INDEBITATUS by husband and wife executrix, declaring, *quòd cum* the defendant was indebted to them as *executor* of *J. S.* for so much money received by him to their use *as executor*, and that he promised to pay it, &c.; the defendant pleaded *non assumpsit*; and at trial the plaintiffs were nonsuited.

The question was, Whether they should pay *costs* upon the statute of 23. *Hen.* 8. c. 15.?

DARNELL, *Serjeant.* They shall pay costs; for this action is brought by them in their own right, and upon a * contract with themselves, *viz.* the receipt of the money to their use, and in which they ought not, at least they need not, to name themselves executors; and the naming the plaintiff executor when it is not of necessity, shall not exempt him from paying costs (*a*). And for a foundation to this distinction he relied on THE YEAR-BOOK of *Henry the Seventh* (*b*), where the difference is taken between an action brought upon the executor's own possession and where upon the possession of his testator; and upon this he would reconcile the cases of *Bull v. Palmer* (*c*), *Mason v. Jackson* (*d*), and *Gale v. Till* (*e*). If an executor bring *trover* for a trover and conversion in the time of his testator (*f*), or upon a trover in the time of his testator, and a conversion in his own time (*g*), he shall not pay costs: so

S. C. post. 181.
S. C. 1. Salk. 207.
S. C. 3. Salk. 105.
S. C. Holt, 313.
S. C. 11. Mod. 174. Ld. Ray. 224. 443. 437. 865. 1413. 12. Mod. 440. Savil, 133. 1. Salk. 207. 314. 3. Salk. 106. Hutton, 79. 11. Mod. 135. B. R. H. 205. Bull. N. P. 332. 3. Will. 272. 1. Bac. Ab. 518. 2. Term Rep. 477. 4. Term Rep. 281. 277.

(*a*) See Latch, 220. Hutton, 78.
(*b*) 2. *Hen.* 7. pl. 15.
(*c*) 2. Lev. 165.
(*d*) 3. Lev. 60.
(*e*) 3. Lev. 375. S. C. 4. Mod. 245.
(*f*)
(*g*) See the case of Cockerell and his Wife, executrix of Moody, *v.* Knyaston, in Easter Term, 31. *Geo.* 3. in *trover* for goods: the FIRST COUNT stated the trover and conversion to have been in the life-time of the testator; the SECOND COUNT stated the trover in the life-time of the testator, and the conversion afterwards; and the THIRD COUNT was for a trover and conversion after the death of the testator: and at the trial the plaintiffs were *nonsuited*: the only evidence at the trial was applicable to the first count; and the Court held that the plaintiffs in this case were not liable to costs. 4. Term Rep. 277.

upon

upon an *assumpsit* *quantâsset* with the executor for debt due to the teſtator, the executor ſhall not pay coſts (*a*). JAMES AND RICHARD *against* PLOMER.

HOLT, *Chief Juſtice.* If the receipt were ſince the teſtator's death, and by appointment or conſent of the executor, there the action muſt have been brought by him not as an executor; for the receipt by his appointment is a receipt by himſelf. Then if the receipt be without the executor's previous appointment, yet the bringing of this action is an aſſent to the receipt, and makes it a receipt in his own right; ſo that in either caſe the debt ought to be looked upon as a new debt, contracted ſince the death of the teſtator. And this receipt muſt be intended to have been in the executor's own time, becauſe the receipt is laid to have been to the executor's uſe; and he concluded that there was no room for the executor here to declare as executor: if there be a receipt by the appointment of an executor, it is immediate aſſets in the executor's hands, and by bringing this action it is ſo in the ſame manner. 2. Vent. 209. If an executor or an adminiſtrator bring *trover* upon their own poſſeſſion, they ſhall pay coſts. Yet there, if the adminiſtrator calls himſelf adminiſtrator, and it is ſo entered on the record, and he has judgment, and afterwards the adminiſtration is repealed, the defendant would be relieved by *audita querela* (*b*), becauſe it would appear on the face of the declaration that he had been ſued under that now repealed adminiſtration. And the naming himſelf executor here is not of neceſſity, any farther than to ſhew how the original right Jones, 170. came. If an executor account with the teſtator's debtor, indeed thereby a new action accrues, but ſtill it is in the right of the teſtator, and no new contract is made, but only an aſcertaining of what was due before. If judgment and execution be in the teſtator's life, and an eſcape in the executor's time, upon a nonſuit in an action by the executor for this eſcape, he ſhall not pay coſts; but if he had judgment and execution in his own time, and an eſcape had happened, for which he had brought an action and been nonſuited, he ſhould have paid coſts.

POWELL, *Juſtice.* Where the thing ſued for is *aſſets* in the executors or adminiſtrators before recovery, there they ſhall pay 1. Vent. 109, 110. *coſts* upon the *nonſuit*; or when the entire cauſe of action ariſes in his own time.

And IT WAS AGREED to have been adjudged, that in an action for rent accruing in * an executor's own time, if the executor be nonſuited, he ſhall pay coſts; ſo alſo that in an action on a covenant with the teſtator, and a breach in the time of the executor, he ſhall pay coſts on being nonſuited. * [93]

Quære per me, If there be any difference upon this account Hob. 233. between covenant for rent upon a covenant made with teſtator, and debt for rent upon a leaſe with him?

And it was agreed by THE WHOLE COURT, that the ſtatute does not, by the words thereof, diſtinguiſh the caſe of an executor

(*a*) (*b*) 1. Bac. Abr. 198.

from

JENKINS AND HIS WIFE *against* PACKER.

from any other case; but that it was by an equitable construction resolved so by the Judges for this reason, because the nature or cause of action does not lie in their privity or knowledge.

And HOLT, *Chief Justice*, said, that it has been held, that if the plaintiff's declaration were so bad, that the plaintiff, in case he obtained a verdict, could not have judgment, there, if he were nonsuit, he should pay no costs; and therefore this action being by husband and wife upon the possession of the husband only, so as if there had been a verdict, he could not have had judgment, he could have no costs: but he said the contrary had been resolved (*a*).

Hob. 80.

The case being moved again to-day, the case of *Elwis v. Mocato* (*b*) in this court, in *Easter Term*, in the second year of *Queen Anne*, was quoted for the plaintiff; which was several counts by a plaintiff executor, one whereof was an *indebitatus computassent*, and, on being nonsuited, the Court held, that he was not liable to costs; which case was now again agreed, because there was no new cause of action, but a new action upon an ascertaining of an ancient cause, which ascertaining leaves it still a debt of the testator's (*c*).

IT WAS AGREED now by the Court, that the case in THE YEAR-BOOK of *Henry the Seventh* (*d*) is a good foundation for this case; for there it is agreed, that a *feme* executrix cannot give the goods of her testator away without the consent of her husband, and if he consent to it, then it is he that gives them; so the wife here cannot appoint one to receive this money, but if the husband consent, then it is his appointment. And if an executor appoint another to receive a debt of his testator, and he receive it, it is now the same thing as if he had actually received it himself, and will be *assets* in his hands; and, by consequence, appointing another to receive who will not repay, is a *devastavit*.

HOLT, *Chief Justice*, strongly inclined, that the bringing of this action was such a subsequent agreement as would make it *assets* in his hands from that time, by the rule of *omnis ratihabitio retrotrahitur, et mandato sæquiparatur* (*e*). But he agreed, that no more would be *assets* in his hands than he recovered, and not as much as was received or declared for, and even for that he would not be liable until after judgment; but immediately after judgment, and before execution, he is liable: whereas where one sues as executor, though he has judgment, yet until execution the thing recovered is not *assets* in his hands. And as if the husband had actually appointed the defendant to receive, he alone ought to bring the action in his own name; so here the

(*a*) Hob. 219. 284. 1. Cro. 175.
(*b*) 1. Salk. 314. 7. Mod. 48.
(*c*) See Marsh v. Jennedy, And. 359. and Goldthwayte v. Petrie, 5. Term Rep. 234. where this case is denied to be law.
(*d*) 2. *Hen.* 7. pl. 15.
(*e*) Co. Lit. 206. 245. 9. Co. 106. 4. Co. 30. Plowden, 8. and Wingate's Maxims, 485.

ratihabition

ratihabition amounting to *an appointment*, he ought to bring it alone: as if a man enter into my land, and take the profits thereof, I may, if I please, * charge him in account as my *bailiff*, though there never was any privity between us until the action brought. And where it was objected, that if the bringing of the action should amount to *an appointment*, then by bringing the action the whole would be assets in his hands before any recovery, he answered, that would not follow, for they being nonsuit, the matter is set at large again, and he has liberty to sue the original debtor; but if he had had judgment, and no execution, or ever like to have any, yet his bringing the action, and having judgment, would discharge the first debtor, and by consequence be a *devastavit* in him; for by the judgment he makes the defendant his debtor, who never owed any thing to the testator. And he quoted the case of *Norden v. Levit* (*a*), which was this: An executor brings *trover* for a conversion in the life of his testator, and, the party being arrested and insolvent, he takes a covenant from him for the payment of so much money in satisfaction; and it was held, that forasmuch as this extinguished the original cause of action, it was an immediate *devastavit*; which judgment was affirmed by the house of lords; *à fortiori*, the extinguishing of the original debt by judgment against the present defendant would, in this case, be a *devastavit*, and upon judgment given, not the administrator *de bonis non*, but the administrator of the executor, should sue execution. If an executor lose the testator's goods out of his possession, and declare that he was possessed of so much goods as the executor to *J. S.* and upon the evidence it appears that they were his own proper goods, he shall be nonsuited, and pay costs (*b*). If one as administrator bring trover upon his own possession, and is nonsuited, he is condemned in costs, but after administration is revoked, he shall, by *audita querela*, be relieved against the costs. And this was the case of *Turner v. Davis* (*c*), in the sixteenth year of *Charles the Second*. And it was laid down for a rule, that where an executor brings an action in which he need not name himself executor, there, if he be nonsuit, he shall pay costs (*d*).

Hob. 36.

1. Vent. 119. *contra.* Post. 181.

1. Mod. 62. 2. Saund. 148. 3. Keb. 668.

But POWELL and GOULD, *Justices*, seemed *contra*, for this was an action to make *assets*, and not for the recovery of what is so already; and immediately after the receipt there was no *assets* accrued to the executor.

But HOLT, *Chief Justice*, said, that in the case *Peacock v. Steer*, reported in *Croke* (*e*) to be three against one, as it is in *Hutton* (*f*), is two to two: however, he was of opinion that there ought to be no *costs*, for the ward never came to the actual possession of the executor,

Hutt. 78. Lat. 220. Cro. Jac. 229. 350. 361. Cro. Eliz. 403. 3. Lev. 60. 1. Vent. 109, 110. *contra.*

(*a*) *Easter* Term 29. *Car.* 2. in the king's bench. 1. Freem. 242. S. C. 1. Eq. Abr. 240. S. C. 2. Jones, 88. S. C. 3. Keb. 597, 615. 691. 706. 742. 778. S. C. 2. Lev. 139.

(*b*) Hutton, 214 220.

(*c*) 1. Mod. 62. S. C. 2. Saund. 148. S. C. 3. Keb. 668.

(*d*) Cro. Jac. 229. 361.

(*e*) Cro. Car. 29.

(*f*) Hutt. 78.

cutor,

JENKINS AND HIS WIFE *againſt* PLOMER.

cutor, and could not therefore be *aſſets* in him: as if a teſtator's goods be taken and converted after the death of the teſtator, before they come to the actual poſſeſſion of the executor, they are not *aſſets*; and therefore if he be nonſuit in *trover* for them, it were hard to make him pay coſts.

Et adjournatur (*a*).

(*a*) THE COURT, after taking time to conſider, were unanimouſly of opinion, that in this caſe the defendant ought to have coſts. S. C. poſt. 181. And ſee Cockerel *v.* Kitynſton, 4. Term Rep. 277. and Goldthwayte and his Wife *v.* Petrie, 5. Term Rep. 234.

*[95]

Caſe 131.

The Queen *againſt* Watton.

The caption of AN INQUISITION of forcible entry upon the 8. *Hen.* 6. c. 9. ſtating it to be by "*jurati* "*ſworn and* "*charged upon* "*their oath*, "*&c.*" is good, although the words "*to in-*"*quire for the* "*body of the* "*county*" be omitted.

S. C. Holt, 366. Cro. Jac. 633. Palm. 227. 1. Salk. 260. 353. 2 Salk. 450. 8. Mod. 65. Ld. Ray. 215. 548. 2710.

IN the caption of an inquiſition of forcible entry, it was ſaid, "JURATORES *jurat' et onerat' ſuper ſacramentum ſuum, &c.*"

BROTHERICK excepted, that it does not appear what the jury were ſworn to do, whether they were an *inqueſt of inquiry*, or a *petit jury*; and though it might not be neceſſary to ſay, that it was "*ad inquirendum pro corpore comitatûs*," yet at leaſt it ought to appear that they were *an inqueſt*.

THE COURT ordered precedents to be ſearched.

HARCOURT, at another day, informed the Court, that moſt of the inquiſitions in the time of king *Charles the Second*, that wanted theſe words, "*ad inquirendum*," were quaſhed.

HOLT, *Chief Juſtice*, anſwered, that he had known inquiſitions quaſhed for it; but ſince it was a particular offence, and at the ſuit of the party by the ſtatute, by his conſent, none ſhould ever be quaſhed for it. In no indictment is it ever ſaid what the jury is to enquire of, but only, *ad inquirendum pro domino regina pro corpore comitatûs*. As to the want of the words, *ad inquirendum*, in caſe of *petit* jury, you only ſay, *elect. triat' et jurat'*, without ſaying, *ad triandum exitum*: and here it is ſaid, *jurat' et onerat' dicunt ſuper ſacramentum*, and it does appear that they were ſworn to preſent, becauſe there is no iſſue joined: and the reaſon why in *preſentments* at the general quarter-ſeſſions it is neceſſary to ſay, *ad inquirendum pro corpore comitatûs* is, becauſe their commiſſion is ſuch, and the jury muſt enquire according to the commiſſion; but here their commiſſion is by a ſtatute: and if it were an indictment for riot upon the ſtatute of 13. *Hen.* 4. c. 7. it might perhaps be held well, without the word "*inquirendum*".

And the inquiſition was confirmed PER CURIAM.

Parker

Parker *againſt* Sir William More.

Caſe 132.

SIR WILLIAM MORE was taken up on *a Sunday*, upon a Judge's warrant, for eſcaping out of priſon.

A priſoner who has *eſcaped* may be re-taken on *a Sunday*, either by the officer on *freſh purſuit*, or by virtue of an *eſcape warrant*.

The queſtion was, Whether this being on *a Sunday* were ſuch a ſervice of proceſs as was againſt the ſtatute of 29. *Car.* 2. c. 7.

And though the court of common pleas conceived it was, and had diſcharged ſome for that reaſon, yet now THE WHOLE COURT of king's bench held this taking to be in the nature of a *freſh purſuit*, that is, a further force and means added to a freſh purſuit by the ſtatute. It is no *original proceſs* (*a*); for a commitment upon it is but the old commitment continued down. The gaoler or party might have taken him upon a freſh purſuit upon *a Sunday* before this ſtatute (*b*).

S. C. 3. Salk. 148. S. C. 2. Ld. Ray. 1028. 2 Salk. 626. Ante, 21, 82, 83. Poſt. 96 154. 230. 254. 5. Mod. 95. 450. 8. Mod. 21. 12. Mod. 275. 348. 606. Tidd's Pract. 387. 1. Atk. 53. Selw's Pract. 15. 3. Com. Dig. "Eſcape" (E.). "Temps" (B. 3.). 8vo. 55 Selw's Pract. 14. 1. Term Rep. 265.

HOLT, *Chief Juſtice*, beſides ſaid, that if the Court relieve him, it muſt be by *audita querela*; for it being on *Sunday*, is a fact traverſable.

But CAETERI, If there were no more in it, we would do it upon motion, but would not relieve in this caſe.

(*a*) But if *A.* be arreſted at the ſuit of *B.* and diſcharged, the ſheriff not knowing that there was alſo a detainer in his office at the ſuit of *C.* and be arreſted on the *Sunday* following at the ſuit of *C.* he ſhall be diſcharged by virtue of 29. *Car.* 2. c. 7. for this is an *original taking*, and not a re-taking after an eſcape. Atkinſon v. Jameſon, 5. Term Rep. 25.

(*b*) Now by 5. *Ann.* c. 9. ſ. 3. eſcape warrants may be executed on a *Sunday*.

Anonymous.

Caſe 133.

NOTE, On an eſcape out of either compter, the action muſt be againſt both the ſheriffs of *London*.

Action for an eſcape from THE COUNTER.

muſt be againſt *both* the ſheriffs. Carth. 145. 1. Show. 162. Co. Ent. 436. Co. Eliz. 623. 3. Com. Dig. "Eſcape" (B. 2.). 1. Roll. Abr. 99.

* Lidford *againſt* Thomas.

Caſe 134.

EYRE moved to have the defendant diſcharged out of cuſtody, for that he had been arreſted on *a Sunday* by proceſs out of this court; but in truth it appeared that he was taken without any warrant on *a Sunday*, and kept locked up until *Monday* morning, and then a writ was got (*b*).

If a bailiff arreſt a perſon without warrant on a *Sunday*, and detain him by virtue of a warrant procured the next day, the Court will grant an *attachment* againſt the officer, but will not diſcharge the priſoner, for he may have an action for the *falſe impriſonment*. 2. Keb. 777. 838. 1. Mod. 56. 1. Salk. 8.

(*b*) If a perſon be arreſted after the writ is returnable, the officer cannot legally detain him, though for the ſhorteſt time, until the writ be continued. Loveridge v. Philſtow, 2. H. Bl. Rep. 29. See alſo Planch v. Anderſon, 5. Term Rep. 37.

PER

THE QUEEN against THE PARSON of LITTLEPORT.

charge for ſo much to the pariſh; and in caſe of a baſtard child, they ſhall be allowed what they have laid out to the midwife, or maintenance of the child, before any order made. And the caſes objected, where a law was fain to have been made on purpoſe for reimburſement, they are nothing like this; for here the pariſh is by the law chargeable to the relief of the poor, but there it was not chargeable by any means.

HOLT, *Chief Juſtice.* The queſtion is, how the law ſtands. The ſtatute appoints a method for the relief of the poor, *viz.* that the churchwardens and overſeers, and ſuch inhabitants as they ſhall call to them, ſhall make a rate: but here the officer begins the wrong way, that is, advances money without any rate made; and this is the way to oppreſs the pariſh with too great a charge: and if any ſudden charge come after a rate made, there ought to be a new rate made for that, though I do not ſay but that a rate may be made after the poor are relieved; but then the order ought to be for levying the money for *the poor*, and not for *the overſeer*, though it is reaſonable the overſeer ſhould thereout ſatisfy himſelf for what he before laid out; but ſtill the overſeers muſt account with the juſtices for what they have received, and what laid out: and this is not like the caſe of a baſtard child, for there is no method of raiſing or of laying the money out in that caſe as there is here.

2. Salk. 535. 531. 533.

POWELL, *Juſtice, accord.* I would help you if I could. It is true, there may be ſuch an exigency as would not admit of the delay of a rate; and there the overſeer may advance, and ought to have a rate in convenient time, and have it approved as it ought by the juſtices; and if they refuſe to approve, there a *mandamus* had been proper; but ſtill that rate ought to be a poor's rate, and not to reimburſe himſelf, but that is his own buſineſs, when he gets the money: but the overſeer is not obliged to advance any money until rates be made and the money raiſed; and by the ſtatute a rate ought to be made once a-month.

Now this Term it was urged, that by the ſtatute of 43. *Eliz.* c. 2. by which overſeers of the poor are appointed, he is to be choſen yearly at *Eaſter*; and immediately before any rate can be made, here will be a neceſſity for money; for juſtices of peace make orders upon overſeers to relieve ſuch a perſon without taking notice whether there be money or not, and indictments have been frequent for diſobeying ſuch orders: and *Dalton's Juſtice of Peace* was quoted, where it is ſaid, that an order of ſeſſions for refunding an overſeer had been allowed of: and as to the objection, that it is not to levy any ſum certain, it could not be otherwiſe; for if *a mandamus* were to levy thirty pounds, and but twenty pounds due, it would be a good return to ſay, that there were not thirty pounds due.

Quod HOLT *non erat (a).*

(a) See the caſe of Rex v. Grey, ante, 89.

HOLT,

HOLT, *Chief Juſtice.* An overſeer need not advance a farthing of his own money, for the churchwardens and overſeers of the poor may make a rate whether the pariſh will or not, ſo it be confirmed by juſtices of the peace; and if any refuſe to pay ſuch rate, it may be levied by diſtreſs: and there ought to be a *monthly rate*, becauſe poſſeſſors are to pay, and poſſeſſions frequently change. THE QUEEN *againſt* THE PARISH OF LITTLEPORT. Carth. 160. 362.

And PER TOTAM CURIAM the writ of *mandamus* was quaſhed (*a*).

(*a*) See Rex v. Ware, 1. Bott's P. L. 172. Rex v. Limehouſe, Foley, 22. Rex v. Overſeers of Chicheſter, 1. Bott's P. L. 276. Rex v. Welch and Others, 1. Bott's P. L. 277. Rex v. Macclesfield, 1. Bott's P. L. 78. 239. 269.

* The Queen *againſt* Daniell.

Caſe 140.

DANIELL was indicted, for that he one *Charles Scort*, ſervant and apprentice of one *Joſeph Biſhop* of *London*, *à ſhopâ et domo, et à ſervitio præd.* JOSEPH *diſcedere; et ſeipſum abſentare procuravit, allexit, perſuaſit, et cauſavit.*

An *indictment* will not lie againſt a man for inticing an apprentice to leave his maſter's ſervice; for it is of a private nature, and to the prejudice of a ſingle perſon only; the remedy is by *action on the caſe*; but to perſuade a ſervant or apprentice to embezzle his maſter's goods is an indictable offence.

BROTHERICK excepted, that there was no averment, that the ſervant had left the ſervice; and though in ſome caſes, if one adviſe or perſuade another to an ill thing, if the thing be done in purſuance of ſuch advice, the adviſor ſhall ſhare in the offence; yet in no caſe is the bare giving advice, or endeavouring to perſuade one to do an ill thing without more, puniſhable: but he agreed, that if ſeveral conſpire and confederate together to do an ill thing, though nothing more be done, it will be indictable, becauſe the meeting together in order to ſuch confederacy is unlawful (*a*). All that is charged here might be for prevailing with this ſervant to go with him to the next door to drink a pot of ale. If a freeman of a corporation or borough endeavour, intend, or conſpire with others, to do an act that tends to the prejudice of the corporation, yet if there be no act done, it is no good cauſe of diſfranchiſement, nor of indictment (*b*); *à fortiori*, it will not be a good cauſe here, where the endeavour is only to the prejudice of a ſingle perſon in one particular inſtance: and the rule is, "*Non officit conatus niſi ſequatur effectus.*" Even in a conſpiracy there muſt be ſomething done in purſuance of it. The ſtrongeſt caſe of this kind was the caſe of *The King v. Starling* (*c*); it was an indictment for meeting and conſpiring together how to impoveriſh the farmers of the exciſe; and the reaſon why that was held indictable was, becauſe ſuch a thing would affect the publick revenue; but if the conſpiracy were, that none ſhould buy coffee from *B.* and no more done, it would not bear an indict-

S. C. poſt. 182. 289. S. C. 1. Salk. 380. S. C. 3. Salk. 91. S C. Holt, 346. S. C. 2. Ld. Ray. 1116. 2 Roll. Abr. 75. Noy, 105. Poph 132 4. Com. Dig. "Indictment" (I.) Cowp. 54.

(*a*) Vaughan's Caſe, Poph. 134. 2. Roll. Abr. 75.
(*b*) Baggs' Caſe, 11. Co. 98. 1. Roll. Rep. 226.
(*c*) 1. Sid. 174. 1. Lev. 125. 1. Keb. 650. 675. 682.

THE QUEEN *againſt* DANIELL.

indictment: ſo if a confederacy be to way-lay a man, and kill him, or rob him.

But HOLT, *Chief Juſtice*, denied the two laſt inſtances.

THE SECOND EXCEPTION was, that it was not ſaid how long he has withdrawn, in caſe any abſenting or withdrawing be underſtood, which ought not to be; for whatever is eſſentially neceſſary to maintain an indictment, muſt be directly and clearly charged, and not by inference only.

KING, *contra*. The words "cauſing, procuring, &c." are very ſtrong, and neceſſarily import a withdrawing; and he quoted a precedent of this kind out of *Raſtal (a)*. Surely this is a matter indictable, for it breaks that truſt which is between maſter and apprentice, with very ill example and publick influence to all the apprentices in *England*.

* [100]

* HOLT, *Chief Juſtice*, doubted whether it were an offence indictable, becauſe it was only a private wrong to the maſter; and that inticing, &c. a man to do a thing, neceſſarily imported that the thing was done. The *Caſe of Starling* was directly of a publick nature, and levelled at the Government; and the *gît* of the offence was its influence on the publick, and not the conſpiracy, for that muſt be put in execution before it is a conſpiracy: if two or three confederate and agree to indict a man of a crime of which he is not guilty, the very meeting and agreement is an ill and unlawful act, but not indictable perhaps; but if a meeting be to rob or kill, it may be indictable; but even there adviſing one to rob or kill, without ſomething be done thereupon, is not indictable; and if a man commit any offence under treaſon or felony, and another deſire him to withdraw from juſtice, or do receive or harbour him in his houſe, &c. it is no offence puniſhable, no more than it is to protect a man in his houſe from arreſts in a civil action. And ſince you do not ſay for how long time the abſence was, if there were no more in it, how can the Court apportion the puniſhment to the offence? And he agreed, that a conſpiracy to charge one with a baſtard-child is indictable (*b*); but if one ſhould adviſe another to do it without more, it would not.

Ante, 48. 55. 1. Vent. 206. 2. Vent. 25.

POWELL, *Juſtice*, thought this matter indictable, becauſe there are many acts of parliament concerning the regulation of apprentices and ſervants, and that to run counter againſt any of thoſe acts, is matter indictable; for it becomes a publick concern, that they ſhould be kept in good order: if one prevail with a wife to leave her huſband, he is indictable for it, though it be of no more publick nature than this, becauſe it is a breach of the common ſociety of mankind; and this tends to deſtroy the publick truſt and confidence that ought to be between maſter and ſervant;

(*a*) Raſtal "Indictment". 137. 185. See alſo Ld. Ray. 81. 377.
(*b*) Hob. 219. Reg. v. Beſt, poſt. 1189.

and

FREDERICK ALLIS
ATTORNEY-AT-LAW
NO. 1 BROADWAY, NEW YORK

THE QUEEN against DANIELL.

and in respect whereof the law makes it a greater crime in a servant to kill his master than in another, for it is *petit treason* in him, and only *murder* in another: and he quoted *the Poulterers' Case (a)*, where bare conspiracy without more was held indictable. Then let us see the manner of laying it, and I think it is well enough, for the case will lie for procuring a *false return*, with alledging, that a false return was made; and though there be no certain time of absence laid, it is *discedere à servitio*, and that shall be a final and total withdrawing.

1. Sid. 68. 1. Lev. 62. Mo. 813. Cro. Car. 15. 2. Bulst. 271. 1. Jo. 93. Lat. 79. Hard. 196.

GOULD, *Justice*, accorded with POWELL *in omnibus*.

BROTHERICK. Every violation of the law, every common trespass, is *in malum exemplum*, but not indictable (*b*); and as to the continuance of absence, if a man lay a common trespass done at such a day, it shall not be intended to continue farther without a *continuando:* sure then it will be hard to intend an offence laid in an indictment to be committed at a certain day, to continue longer than is expressly laid: and he said, that if, at common law, one had bound himself for a year, and another had prevailed with him to absent * himself from that service, an indictment would not lie for it: indeed, if this were the case of an apprentice compellable to serve by act of parliament, it would be the stronger against me; but for a bare apprentice, that is only under an obligation of his own making, it is very hard to maintain it.

* [101]

HOLT, *Chief Justice*. If a servant for a year, or at will, kill his master, it will be *petit treason*; and yet to intice such a servant to leave his master, would not be indictable; so that reason fails: for the reason why it is *petit treason*, is because of the breach of duty, and not of the continual obligation of service.

The case was moved again this Term, and THE WHOLE COURT unanimously resolved, that the indictment was ill as to the manner, for want of an express allegation that the servant did absent; for though a cause cannot be without an effect, and it is said that the defendant *caused* him to leave his service, yet in indictments it ought to be expressly said, that *the effect* did follow; and so it was in the case of *The Queen v. Tracy* (*c*) before. *Fitzherbert* (*d*) was quoted, that *trespass* might lie for seducing a servant (*e*), and THE COURT said, there might be a difference between *a servant* and *an apprentice*. And they would not resolve whether the matter of this indictment were sufficient or not.

1. Salk. 380. Ante, 30. Post. 114. 172. 289.

The judgment was arrested *nisi* before the end of the Term.

And the last day of Term, HOLT, *Chief Justice*, said, he was not satisfied, that to seduce one's servant away was indictable,

(*a*) 9. Co. 55.
(*b*) See 3. Burr. 1698. 1706. 1731.
(*c*) Ante, page 30.
(*d*) Fitz. N. B.
(*e*) See Hart v. Aldridge, Cowp. 54. that a master may bring trespass for seducing his servant, although he is only employed as a *journeyman*, to work by the piece.

THE QUEEN *againſt* DANIELL.

but to perſuade him to embezzle his maſter's goods was: but then, whether it were neceſſary to alledge that he had embezzled them, for he ſaid the indictment might perhaps be for the evil act of perſuading (*a*).

An indictment for embezzling a maſter's goods muſt ſtate *where*.

BUT NOTE, here it was ſaid, that the ſervant did embezzle; but no *venue* was laid.

So THE JUDGMENT was arreſted.

(*a*) This caſe was moved again, and THE WHOLE COURT were of opinion, that the *enticing* of an apprentice or a ſervant to depart from his maſter is not an offence of *a publick nature*, but that the remedy is by action on the caſe. Poſt. 182. But *enticing* an apprentice or ſervant to ſteal his maſter's goods is an indictable offence. Rex *v.* Collingwood, poſt. 289.

Caſe 141.

Ireland's Caſe.

In debt on bond the defendant, on bringing *principal intereſt* and *coſts* into court, ſhall be relieved againſt the penalty.

Ante, 11. 25. Poſt. 153. Salk. 597. 2. Stra. 900. B. R. H. 116. 5. Com. Dig. "Pleader" (C. 10.).

RAYMOND moved to bring principal, intereſt, and coſts, into court, and to be relieved againſt the penalty.

MONTAGUE urged, that in this caſe they would not relieve in chancery, unleſs the party obligor would pay a debt barrable by the *ſtatute of Limitations*; and inſiſted on the like benefit here, this being an equitable motion.

But THE COURT would not hear of it, but made the common rule.

NOTE, The whole penalty muſt be brought into court, becauſe intereſt and full coſts are to be taxed; and one may have the remnant out immediately (*b*).

Vide ante, 11. 25. 60. Poſt. 153. 2. Salk. 583. 596, 597.

(*b*) By 4. and 5 *Ann.* c. 16. "In an "action on a bond with a penalty, if the "defendant bring into the court where "the action is depending, all the prin- "cipal and intereſt due, and all coſts "expended in any ſuit in law or equity, "upon ſuch bond, the money brought "in ſhall be taken in full ſatisfaction of "ſuch bond, and the Court may give "judgment to diſcharge the defendant "of and from the ſame." See 1. Wilſ. 157. 1. Term Rep. 629. 711. Stra. 1271. 4. Term Rep. 10. 3. Term Rep. 657. But in debt on bond with condition to account for money to be received, the Court will not ſtay proceedings or payment of the penalty into court; for in ſuch caſe damages may be recovered for more than the penalty. Lord Lonſdale *v.* Church, 2. Term Rep. 388.

* [102]

Caſe 142.

* Croſſe *againſt* Bilſon.

Replevin for taking a mare in the highway. Salk. 3. Pract. Reg. 157.

NORTHAMPTON, *to wit.* JOHN BILSON was ſummoned to anſwer to *Samuel Croſſe* in a plea why he took a mare of him the ſaid *Samuel*, and unjuſtly detained it, againſt ſurety and pledges, &c. And whereon the ſame *Samuel*, by *W. L.* his attorney, complains, that the ſaid *John*, on the firſt day of *October*, in the twelfth year of the reign of our lord *William the Third*, late *King of England*, &c. at *Hardingſton*, in the county aforeſaid, in a certain place there called the *King's Highway*, a mare

mare of him the ſaid *Samuel* took, and unjuſtly detained it, againſt ſurety and pledges, until, &c. whereby the ſame *Samuel* ſays that he is prejudiced, and hath damage to the value of 10l. And therefore he produces the ſuit, &c. Crosse *ag. irſt* Bilson.

And the ſaid *John Bilſon*, by *J. B.* his attorney, comes and defends the force and injury when, &c. and as bailiff of the moſt noble *William Lord Leimpſter* well acknowledges the taking of the mare aforeſaid the ſaid time when, &c. in a certain place called the *Queen's Highway*, and juſtly, &c. becauſe he ſays, that the ſaid place contains, and the ſaid time when, &c. did contain, within itſelf, half a rod of land, with the appurtenances, in *Hardingſton* aforeſaid; which ſaid half rod of land long before, and the ſaid time when, &c. was parcel of a certain ancient meſſuage in *Hardingſton* aforeſaid; which ſaid meſſuage long before, and the ſaid time when, &c. was the ſoil and freehold of the ſaid *Lord Leimpſter*; and becauſe the mare aforeſaid the ſaid time when, &c. was in the ſaid half rod of land in which, &c. doing damage there, the ſaid *John*, as bailiff of the ſaid *William Lord Leimpſter*, well acknowledges the taking of the mare aforeſaid in the place in which, &c. and juſtly, &c. doing damage there, &c. without that, that the ſaid *John* took the mare aforeſaid in a certain place called the *King's Highway*, as the ſaid *Samuel* againſt him hath declared: and this he is ready to verify: wherefore he prays judgment, and a return of the mare aforeſaid, to be adjudged to him, &c. Cognizance for *damag. feaſant.*

And the ſaid *Samuel* ſays, that the ſaid *John Bilſon*, as bailiff of the moſt noble *William Lord Leimpſter*, the taking of the mare aforeſaid ought not to acknowledge juſt, becauſe he ſays, that he the ſaid *John Bilſon*, the ſaid time when, &c. took the mare aforeſaid in the ſaid place then called the *King's Highway*, in manner and form as the ſaid *Samuel* above by declaring hath alledged; and this he prays may be enquired of by the country. Plea in maintenance of the declaration.

And the ſaid *John* ſays, that he to the plea of the ſaid *Samuel* above in replying pleaded hath no neceſſity, nor is by the law of the land obliged in any manner to anſwer, becauſe he ſays, that the ſame plea is not ſufficient in law to maintain his declaration aforeſaid: and this he is ready to verify: wherefore for want of a ſufficient replication in this behalf the ſame *John* as before prays judgment, and that the declaration aforeſaid may be quaſhed. Demurrer.

And the ſaid *Samuel*, for that he hath above alledged ſufficient matter in law for him the ſaid *Samuel* to maintain his action and declaration aforeſaid, which he is ready to verify, which ſaid matter the ſaid *John* doth not deny, nor to the ſame in anywiſe anſwer, but that averment hath altogether refuſed to admit, prays judgment, and his damages by reaſon of the taking and unjuſt detention of the mare aforeſaid, to be adjudged to him, &c. And becauſe the juſtices here will adviſe themſelves of and upon the premiſes before they Joinder. 1. Sid. 189, 190 1. Ven. 13[illegible] Cro. Eliz. 20[illegible]

Crosse against Bilson.

they give judgment thereon, day is given to the parties aforesaid here until from the day of *St. Michael* in three weeks to hear their judgment thereon, because the same justices here thereof not yet, &c. On which day here comes as well the said *Samuel* as the said *John* by their attornies aforesaid; and hereupon the premises being seen, and by the justices here more fully understood, it seems to the same justices here, that the plea of the said *Samuel* above in replying pleaded is sufficient in law to maintain his declaration aforesaid, as the said *Samuel* hath above alledged; wherefore the said *Samuel* ought to recover his damages by reason of the premises against the said *John*: but because it is unknown what damages the said *Samuel* hath sustained by reason of the premises, the sheriff is commanded, that by the oath of twelve good and lawful men of the county aforesaid he diligently enquire what damages the said *Samuel* hath sustained, as well by reason of the premises as for his costs and charges by him about his suit in this behalf expended; and the inquisition which he shall thereof make certify here on the octave of *St. Hilary*, under the seal, &c. and the seals, &c. On which day here comes the said *Samuel* by his attorney aforesaid, and the sheriff, to wit, *Cæsar Child, Bart.* hath now returned here a certain inquisition taken before him at the town of *Northampton*, in the county aforesaid, on the nineteenth day of *January* last past, by the oath of twelve, &c. whereby it is found, that the said *Samuel* hath sustained damages by reason of the premises, besides his costs and charges by him about his suit in this behalf expended, to eighty shillings, and for those costs and charges to two-pence. Therefore it is considered, that the said *Samuel* do recover against the said *John* his damages aforesaid to eighty shillings and two-pence by the inquisition aforesaid in form aforesaid found, and also twelve pounds seventeen shillings and fourpence to the said *Samuel* at his request for his costs and charges aforesaid, by the court here of increase adjudged; which said damages in the whole amount to sixteen pounds seventeen shillings and sixpence. And the said *John* in mercy, &c.

Judgment for the plaintiff.

Inquiry awarded.

Final judgment.

General errors assigned.

Afterwards, to wit, on day next after in this same Term, before the lady the queen at *Westminster*, comes the said *John*, by *A. M.* his attorney, and says, that in the record and proceedings aforesaid, and likewise in the rendition of the judgment aforesaid, there is manifest error, in this, to wit, that by the record aforesaid it appears, that the judgment aforesaid in form aforesaid given, was given for the said *Samuel Crosse* against him the said *John Bilson*, when by the law of the land of this kingdom of *England* judgment in the plea aforesaid ought to have been given for the said *John* against the said *Samuel*: There is error also in this, to wit, that by the record aforesaid it appears, that the said *John* was summoned to answer to the said *Samuel* in the plea aforesaid, yet no original writ between the parties aforesaid in the plea aforesaid is filed of record, nor remains of record in the said court of the lady the queen of the bench; therefore in that there is manifest error: There is error also in this, to wit, that by the record aforesaid it appears, that the said *Samuel* in the said court of the

No original.

No warrant of attorney.

the lady the ſaid queen of the bench came and appeared by *W. L.* his attorney, yet the ſaid *W. L.* had no warrant of attorney of record by writ of the now lady the queen, nor without writ, to warrant his appearance for the ſame *Samuel* in the plea aforeſaid: There is error alſo in this, to wit, that by the record aforeſaid it appears, that the ſaid *John* in the ſaid court of the ſaid lady the now queen of the bench appeared by *William Marriot* his attorney, nevertheleſs *William Marriot* had no warrant of attorney of record by writ of the lady the queen, nor without writ, to warrant his appearance for the ſaid *John* in the plea aforeſaid: And the ſame *John* prays ſeveral writs of the lady the queen, to wit, one to the Chief Juſtice of the ſaid lady the queen of the bench, and another writ to the *cuſtos brevium* of the ſaid lady the queen of the bench aforeſaid to be directed, to certify the ſaid lady the now queen more fully the truth thereof: And to him they are granted, &c. Whereupon *Tueſday* next after fifteen days of the *Holy Trinity* is given by the court of the ſaid lady the queen now here to return to the court of the ſaid lady the queen, before the queen herſelf at *Weſtminſter*, the ſaid ſeveral writs of *certiorari* above prayed: The ſame day is given to the ſaid *Samuel* there, &c. And the ſaid Chief Juſtice of the bench aforeſaid, and the ſaid *cuſtos brevium* of the ſaid lady the now queen, on that day have not, nor hath either of them, returned the ſeveral writs aforeſaid, neither have they, or either of them, done any thing therein: And hereupon the ſaid *Samuel* freely here into court comes and ſays, that there is no error either in the record and proceedings aforeſaid, or in the rendition of the judgment aforeſaid; and prays that the court of the ſaid lady the queen now here may proceed to the examination as well of the record and proceedings aforeſaid as of the matters aforeſaid above for error aſſigned, and that the judgment aforeſaid may be in all things affirmed: but becauſe the court of the ſaid lady the queen now here are not yet adviſed to give their judgment of and upon the premiſes, day therefore is given to the parties aforeſaid before the lady the queen until in a month of *St. Michael* whereſoever, &c. to hear their judgment thereon, becauſe the court of the ſaid lady the queen now here thereof not yet, &c. On which day before the lady the queen at *Weſtminſter* come the parties aforeſaid, by their attornies aforeſaid; whereupon as well the record and proceedings aforeſaid, and the judgment on the ſame given, as the ſaid cauſes and matters above for error aſſigned and alledged, being ſeen, and by the court of the ſaid lady the queen now here more fully underſtood and diligently examined, becauſe it ſeems to the court of the ſaid lady the queen here, that the judgment aforeſaid is in nothing vicious or defective, and that there is no error in that record; it is conſidered, that the judgment aforeſaid be in all things affirmed, and remain in its full force and effect, the ſaid cauſes above for error aſſigned in anywiſe notwithſtanding, &c. And it is farther conſidered by the ſame court, that the ſaid *Samuel* do recover againſt the ſaid *John* twelve pounds to the ſame *Samuel* by the court of the ſaid lady the queen now here by his aſſent adjudged, according to the form of the ſtatute thereof lately made

CROSS *againſt* BILSON.

Several *certiorari's* prayed.

Rule to return them.

No error.

Judgment affirmed.

3. H. 7. c. 10.

CROSSE *againſt* BILSON.

and provided, for his coſts, charges, and damages, which he hath ſuſtained by reaſon of the delay of execution of the judgment aforeſaid, on pretence of proſecuting the ſaid writ of the lady the queen to correct error of and upon the premiſes; and that the ſame *Samuel* may have thereof his execution, &c.

* [102]

Caſe 143.

* Croſſe *againſt* Bilſon.

Trinity Term, 2. Anne, Roll 146.

In replevin, if the defendant plead *in bar*, and demur to the replication *in abatement*, the plaintiff, after joinder in demurrer, ſhall have *final judgment* on the demurrer being over-ruled.

S. C. 1. Salk. 3. S. C. Lilly, 351. S. C. Holt, 627. S.C. 2. Ld. Ray. 1016. S. C. Gilb. Diſtreſſes, 16. Barnes, 353. 5. Com. Dig. "Pleader" (3. K. 11.). (3. K. 15.).

REPLEVIN for taking his mare in a certain place called "*The King's Highway.*"

The defendant acknowledged the taking *damage feaſant* in a certain place called "*The Queen's Highway*," as bailiff to the *Lord Lempſter*, whoſe freehold the place WHERE is, ABSQUE HOC that he took the ſaid mare in the place aforeſaid called "*The King's Highway*," as the plaintiff againſt him has declared; *et hoc paratus eſt verificare*; *unde petit judicium*; *et return. &c.*

The plaintiff comes and ſays, "*quod cognoſcere non debet, quia dicit quod dicto tempore quod, &c.*" he took the ſaid mare in the place aforeſaid then called "The King's Highway," *modo et formâ* as the ſaid plaintiff alledged; *et hoc petit quod inquiratur per patriam.*

The defendant demurs, and concludes, "*unde (ut prius) petit judicium, et quod narratio præd. caſſetur.*"

Judgment final was given in the common pleas for the plaintiff, and affirmed upon a writ of error.

HOLT, *Chief Juſtice.* The whole point of the caſe, take it the ſtrongeſt that can be, is thus: After a plea *in bar* and a replication the defendant demurs to the replication, and concludes *in abatement*, and ſure there *judgment final* ought to be given.

In replevin, if the taking is avowed in *another place* the freehold of the defendant as *damage feaſant*, and the plea TRAVERSE the place in the declaration, and conclude with praying judgment and a return, this is a plea *in bar*.—Show. 169. 1. Salk. 3. 5. 93, 94.

AND THEY ALL AGREED, that all the matter of conuſance in the plea was waived by the ABSQUE HOC, and the conuſance being in a different place from where the declaration lays the taking, is, in truth, matter only proper *in abatement*; but the concluſion turning it into an avowry makes it a plea *in bar*, as all *avowries* are, and *final judgment* is always given upon them, if they go for the avowant.

Where matter of *abatement* is pleaded *in bar*, &c. judgment final ought to be given.

THEY ALSO AGREED, that where matter *in abatement* is pleaded *in bar*, and concluded *in bar*, *judgment final* ought to be given. So where the commencement of a demurrer is *in bar*, though the concluſion be *in abatement*. 1. *Lev.* 312.

Cro. Jac. 202. 253. 1. Show. 4. 155. Lut. 42. 1. Mod. 239. 1. Sid. 189.

But

But it was objected, that the demurrer being ill concluded, *viz.* *in abatement*, and contrary to *the bar*, it was to be looked upon as if there were no concluſion at all, and it would be *a diſcontinuance*, and judgment ought to be by *nil dicit*.

In replevin, if a demurrer to a repleader to a plea *in bar* conclude, "wherefore, as before, he prays judgment, *and that the declaration may be quaſhed*," the laſt words are ſurpluſage.

To which THE COURT anſwered, that the concluſion to the demurrer was, "*unde petit judicium (ut prius)*," and that is well enough, and according to the concluſion of the plea *in bar*; and the ſubſequent words *et quod narr. caſſetur*, being inconſiſtent, ſhall be rejected.

So PER TOTAM CURIAM the judgment was affirmed (*a*).

A repleader cannot be upon a demurrer. Ante, 2. 3. Lev. 20. 440.

POWELL, *Juſtice*, here poſitively ſaid, that *a repleader* could never be upon *demurrer*, but is always after *iſſue*: though the old Books ſeemed to make a queſtion of it, yet there were twenty authorities in the new Books of it (*b*).

And yet BROTHERICK ſeemed as earneſt of a contrary opinion at the bar,

Tacente HOLT, *Chief Juſtice, et Cur. reliquâ.*

Alſo, no *repleader* can be upon a writ of error. *Vide* 2. *Keb.* 769. 789. 825.

* [103]

In replevin, the plea of *priſel in autre lieu* is matter of *abatement*.

* NOTE, In the debate of this caſe at THE BAR it was agreed,

FIRST, That the matter of this plea was matter in abatement, *viz.* a variance in the places.

1. Roll. Abr. 781. 3. Mod. 248. Barnes, 351.

In replevin, if the defendant plead *property in himſelf*, he ſhall have a return without cognizance; but if he plead *property in a ſtranger*, he muſt make cognizance. Ante, 69. 81. 1. Salk. 94. 2. Lev. 92. 1. Vent. 127. Cro. Eliz. 896. Cro. Jac. 519. 5. Com. Dig. "Pleader" (3. K. 13.). Stra. 507. Eſpinaſſ. 351.

SECONDLY, That in *replevin* the defendant is both actor and defendant. As defendant, he may abate the plaintiff's writ, and that were vain for him to do if he could not have a return, and therefore he muſt proceed from his plea *in abatement* to make *conuſance*; for his action being a claim of right to diſtrain, he ought to make title to it againſt the plaintiff in the *replevin* who claims property in the diſtreſs. Yet this rule would be explained, *viz.* if the defendant in *replevin* claim property in himſelf, he ſhall have return without conuſance, becauſe his plea deſtroys the plaintiff's title. So if he lay property in a ſtranger, and make no conuſance, if that matter be admitted by the plaintiff, there ſhall be a return without conuſance; for in that caſe, by the admittance the plaintiff's property is deſtroyed (*c*).

But in all pleas that do not ſhew the property out of the plaintiff there muſt be a conuſance made, and *the plea* is what only is anſwerable, and not *the conuſance*; for to traverſe that would be a *diſcontinuance* (*d*).

(*a*) See the caſe of Robinſon *v.* Raby, 1. Burr. 317.

(*b*) Ante, 2. Carth. 193. AND NOTE, the Year Book 9. *Hen.* 6. pl. 25. is contrary to the record.

(*c*) Ante, 81. 2. Lev. 92. 1. Bac. Abr. 14, 15.

(*d*) Year Book 8. *Edw.* 4 pl. 41. b. Watts *v.* Hageton, Cro Eliz 372 and Hall *v.* Foot, Mich. Term, 2. *Will. & Mary*, in King's Bench, 1. Salk. 93.—See alſo 1. Salk. 94.

If

Matter *in bar* concluding *in abatement* ſhall be taken *in bar*.

1. Cro. 202. 5. Mod. 130. 3. Keb. 181. Vide 1. Vent. 136.

If a man plead matter *in bar*, and conclude *in abatement*, it ſhall be taken for a plea *in bar* from the nature and reaſon of the thing (*a*); for the plaintiff can have no writ if he has not a cauſe of action; and therefore the Court will take the plea to be *in bar* (*b*). If one plead matter of *abatement*, and conclude *in bar*, "*et petit judicium* whether the plaintiff *actionem habere debet*," though he begin *in abatement*, and the matter be alſo in abatement, yet the concluſion being *in bar* makes it a bar (*c*); and the reaſon is, becauſe you admit the writ by concluding ſpecially againſt the action (*d*).

In replevin, if a defendant avow at a *different place* to have return, he may plead in abatement, and *traverſe* the place laid in the declaration.

Poſt. 157. 1. Salk. 93. Stra. 507. 5. Com. Dig. "Pleader" (3. K. 13.).

And here HOLT, *Chief Juſtice*, ſaid, that in *replevin* if the defendant will take advantage of *a variance* in the place where the taking is laid from that in which really it was, he muſt plead it *in abatement*, and begin either *petit judicium de breve, et de narrat. quia dicit* the cattle were taken in ſuch a place, ABSQUE HOC that they were taken in the place in the declaration. Then indeed he comes, *et pro retorn. habendo* diſtinctly, he ſays, he avows the taking in the place mentioned in the inducement of his traverſe, *damage feaſant*, or for rent, &c. To which no anſwer is to be given, but all is to depend on the plea *in abatement*.

Defendant in replevin need not pray *damages* either upon an *avowry* or *a plea*.

And it is a proper concluſion in *replevin* to ſay, "*unde petit* "*judicium et return. averior*, without ſaying any thing of damages, for they are given by the ſtatute (*e*).

(*a*) Corniſh *v.* Prior, 1. Show. 4.; Biſſe *v.* Harcourt, 1. Show. 155.—See alſo 1. Bac. Abr. 15. 4. Bac. Abr. 50.

(*b*) Year Books 37. *Hen.* 6. pl. 24.; 36. *Hen.* 6. pl. 24.—See alſo 30. Mod. 112. 192. 210. Gilb. Eq. Rep. 251. Ld. Ray. 101. 337. 595. 1018. Stra. 532. 1161.

(*c*) 1. Lutw. 34.

(*d*) Year Books 18. *Hen.* 6. pl. 27.; 32. *Hen.* 6. pl 17. 36. *Hen.* 6. pl. 18. 22. *Hen.* 6. pl. 53.

(*e*) See the ſtatute 17. *Car.* 2. c. 7. and 1. Salk. 205. 1. Sid. 380. 1. Lev. 255. 1. Vent. 40. Ray. 170.

* [104]

Caſe 144.

* Ogden *againſt* Turner.

A declaration in ſlander for ſaying, "There "goes *A.* who "is one of thoſe "that ſtole *B.*'s "deer," muſt aver, that a deer was ſtolen from *B.* and that it was tame.

ACTION ON THE CASE for theſe words: "There goes *Ogden*, "who is one of thoſe that ſtole my *Lord S.*'s deer."

Againſt the action it was offered, that words ſpoken are not like words in deeds, for that words are to be taken *fortius verſus proferentem* in deeds, &c. but otherwiſe in the caſe of an action for ſpeaking them (*a*). It is not actionable to ſay that "*he ſtole* "*a deer*," without averring it to be a tame one (*b*); or, if that be averred, without alledging that he knew it to be a tame one (*c*). And here it is not averred that *a deer* was ſtolen from *my lord*, as it ought to be; as if it be ſaid, "*A.* poiſoned *B.*" without averring him to be dead, the words are not actionable.

S.C. 2 Salk. 696. S. C. Holt, 40. Ante, 23. 1. Jones, 196. Cro. Car. 140. Yelv. 9. 64. Cro. Jac. 58. 1. Roll. Abr 60.

(*a*) *Dictum per* HOBART, in the caſe of Coote *v.* Gilbert, Hob. 77.

(*b*) 1. Roll. Abr. 70. pl. 50. 54.

(*c*)

ODDIE against TURNER.

IT WAS URGED *contra*, That this muſt be underſtood to be a tame deer, of which felony may be committed, and then without queſtion it will bear an action; or it will be underſtood of a deer in a park or place where deer are kept, and then it comes within the puniſhment of the ſtatute of 3. & 4. *Will. & Mary*, c. 10. againſt Deer-Stealers, whereby they are to pay thirty pounds and impriſonment, or pillory and impriſonment (*a*); therefore *quâcunque viâ datâ*, the action will lie. And the caſe of *Davis v. Garden* (*b*) was inſiſted on, that to ſay of a woman that "*ſhe has* "*a baſtard*," is actionable, becauſe it brings her within the danger of the ſtatute of 18. *Eliz.* c. 3. (*c*). And if the defendant had indicted the plaintiff here, after acquittal he might have maintained an action for it,

CURIA. Words which of themſelves are actionable, without regard to the perſon or foreign help, muſt either endanger the party's life, or ſubject him to infamous puniſhment; and it is not enough that the party may be fined and impriſoned, for if one be found guilty of any common treſpaſs he ſhall be fined and impriſoned, yet none will ſay, that to ſay one has committed a treſpaſs will bear an action; or, at leaſt, the thing charged upon him muſt in itſelf be ſcandalous. And this here is, that "*he ſtole a deer*," which is *feræ naturæ*, and therefore not ſcandalous. To ſay ſuch a one *burnt a barn*, without ſaying that it was part of a manſion-houſe, or had corn in it, is not actionable (*d*); and the caſe of *Sir Lionel Walden* (*e*) was carried too far, and happened in a dangerous time, when the kingdom in general was moſt furiouſly enraged againſt popery: the words were, "*Lionel Walden* is a "papiſt, and goes to maſs." And the penalty by the ſtatute is a pecuniary one, and the pillory is only for want of money, ſo is not the direct penalty given by the ſtatute,

And beſides, HOLT, *Chief Juſtice*, ſaid, that the *pillory* upon this account did not make the perſon infamous, but he would remain a good witneſs nevertheleſs (*f*). And to ſay, that one has hunted in a park without leave of the owner, and killed a deer there, which ſubjects him to the penalty of the ſtatute *de Malefactoribus in Parcis* (*g*), or to call a man *a papiſt* ſimply (*h*), will not bear an action. And he ſaid, that to ſay of a * young woman that "*ſhe* * [105]
"*had a baſtard*" is a very great ſcandal, and for which, if he could, he would encourage an action; but it is not actionable, becauſe it 2. Salk. 696.
is a ſpiritual defamation, puniſhable in the ſpiritual court (*i*). So it is to call a man "*a heretick* (*k*). And he denied the firſt reaſon given in *Anne Davis's Caſe* (*l*).

And by THE WHOLE COURT, *Querens nil capiat per billam.*

(*a*) Repealed by 16. *Geo.* 3. c. 30.
(*b*) 4. Co. 16. b.
(*c*) See 1. Vent. 4. 1. Sid. 396. 2. Sid. 7. 21. Palm. 298. 1. Roll. Abr. 34, 37, 38. 1. Cro. 436.
(*d*) See Burham's Caſe, 4. Co. 20.
(*e*) 2. Vent. 265. 3. Lev. 30. 1. Leon. 336. 3. Mod. 26.
(*f*) See 5. Mod. 15. 76. and the caſe of Pendock v. Mackender, 2. Wilſ. 18.
(*g*) 3. *Edw.* 1. c. 20.
(*b*) 3. Mod. 26. 2. Show. 250. 2. Ld. Ray. 812. 1. Viner's Abr. 442. 499. 1. Brown's Parl. Caſes, 97.
(*i*) 1. Roll. Abr. 37. Cro. Jac. 473. Poph. 140.
(*k*) Year Book 27. *Hen.* 8. pl. 14.
(*l*) 4. Co. 17.

Anonymous.

Caſe 145.

Anonymous.

If *feme covert* be arreſted, *common bail* may be filed.

PER CURIAM. If *feme covert* be arreſted, and it be clear and notorious that ſhe is *covert*, common bail ought to be received; but if it be doubted, ſhe ought to find ſpecial bail (*a*).

Ante, 17. 86. S. C. 1. Salk. 379. Poſt. 310. 12. Mod. 444. 1. Barnes, 59. Stra 1167. 1237. 1272. 7. Mod. 10. Tidd's Pract. 49. 1. Bac. Abr. 210, 211.

(*a*) See the caſe of Edwards *v.* Rourke and his Wife, 1. Term Rep. 486. in point. But if the coverture be not clearly made out, the Court will not diſcharge her on *motion*, Pearſon *v.* Meadow, 2. Bl. Rep. 903. but will put the party to plead the coverture in *abatement*, Milner *v.* Milles, 3. Term Rep. 627. If the plaintiff has truſted a married woman or a *feme ſole*, ſhe ſhall, on being arreſted, find ſpecial bail, Wilſon *v.* Campbell, Mich. Term, 20. *Geo.* 3. MS.—See alſo Pearſon *v.* Meadow, 2. Bl. Rep. 903. and Partridge *v.* Clarke, 5. Term Rep. 194. to the ſame purport.

Caſe 146.

Anonymous.

Deceitfully receiving money from one man to the uſe of another, on a pretended order for ſuch purpoſe, is not indictable at *common law*.

A. WAS indicted for *deceitfully* coming to *B.* as ſent from *C.* to whom *B.* owed money, to call for and receive the money, and receiving the money, *ubi revera C.* never did ſend him.

PER CURIAM. If he had come with *a falſe token* it had been criminal, and therefore indictable (*a*); but the queſtion is, Whether this be ſuch a cheat as is indictable? as playing with falſe dice is, for that is ſuch a cheat as a perſon of an ordinary capacity cannot diſcover; but this is an indictment to puniſh one man becauſe another is a fool.

S. C. 1. Salk. 379. Poſt. 301. Ante, 42. 61.

PER CURIAM. Let it ſtay.

3. Mod. 18. 11. Mod. 222. Ld. Ray. 1013. Burr. 1125. 1. Bl. Rep. 273. 1. Hawk. P. C. ch. 71. ſ. 2. 4. Com. Dig. "Indictment" (E.). Stra. 861 2. Term Rep. 581.

(*a*) By 33. *Hen.* 8. c. 1. falſely and deceitfully to obtain goods, &c. by colour or means of any *privy falſe token* or counterfeit letter made in another man's name to a ſpecial friend or acquaintance for the obtaining goods, &c. from ſuch perſon, is an indictable offence. So by 30. *Geo.* 2. c. 24. knowingly and deſignedly by *falſe pretences* to obtain goods, &c. from any perſon, with intent to cheat and defraud any perſon of the ſame, is indictable. See Stra. 866. and Rex *v.* Young, 3. Term Rep. 98.

Caſe 147.

Anonymous.

Treſpaſs lies againſt bailiffs for breaking a houſe, &c.

BAILIFFS broke a houſe to execute their proceſs, and THE COURT would not grant *an attachment*, but bid the party bring his action of treſpaſs (*a*).

Hard. 2. Style, 447. 2. Co. 32, 33. Moor, 606. Dyer, 36. Palm. 53. 1. Bac Abr. 232.

(*a*) Where the bailiff may break open a houſe, &c. vide Cro. Eliz. 753. 908, 909. Cro. Car. 386. 544. Cro. Jac. 280. 486. 556. 5. Co. 91, 92, 93. 7. Co. 6. 126. 2. Co. 66. 11. Co. 82. 12. Co. 131. 4. Buſt. 146. Hob. 62. 263. 2. Rol. 294. Owen, 63. Yelv. 28. Goldſ. 79. 233. 4. Leon. 41. 1. Rol. 182. 1. Jo. 429, 430. Comb. 17. 327. 342. Poſt. 173. 210, 211. NOTE *to the former edition.*—See alſo Foſter's Crown Law, 136. 320. Lee *v.* Ganſel, Cowp. 1.; Cooper *v.* Loct, 1. Term Rep. 535.

Lett

Lett *againſt* Mills.

Caſe 148.

LONDON, *to wit.* } BE IT REMEMBERED, that on *Saturday* next after three weeks of *Saint Michael* in this ſame Term, before our lady the queen at *Weſtminſter*, came *John Lett*, by *George Allgood* his attorney, and brought here into the court of the ſaid lady the queen then there his certain bill againſt *Henry Mills*, one of the clerks of *Rowland Holt*, *Eſq.* and *Robert Coleman*, *Gentleman*, chief clerks of the lady the queen, aſſigned to inroll pleas in the court of her the ſaid lady the queen before the queen herſelf, preſent here in court in his proper perſon, otherwiſe called *Henry Mills*, of the *Inner Temple*, *London*, gentleman, of a plea of debt; and there are pledges of proſecuting, to wit, *John Doe* and *Richard Roe*; which ſaid bill follows in theſe words, to wit, *London* (to wit), *John Lett* complains of *Henry Mills*, one of the clerks of *Rowland Holt*, *Eſq.* and *Robert Coleman*, *Gentleman*, chief clerks of the lady the queen, aſſigned to inroll pleas in the court of her the ſaid lady the queen, before the queen herſelf, preſent here in court in his proper perſon, otherwiſe called *Henry Mills*, of the *Inner Temple*, *London*, gentleman, of a plea that he render to him ſixty pounds of lawful money of *England*, which he owes to him, and unjuſtly detains, for that, to wit, That whereas the aforeſaid *Henry*, on the twenty-eighth day of *June*, in the ſecond year of the reign of our lady *Anne*, now *Queen of England*, *&c.* at *London* aforeſaid, to wit, in the pariſh of *Saint Mary le Bow*, in the ward of *Cheape*, by his certain writing obligatory, ſealed with the ſeal of him the ſaid *Henry*, and now here ſhewn to the court of the ſaid lady the now queen, the date whereof is the ſame day and year, acknowledged himſelf to be held and firmly bound to the ſaid *John* in the ſaid ſixty pounds, to be paid to the ſaid *John*, when he ſhould be thereunto afterwards requeſted: nevertheleſs the ſaid *Henry*, although often requeſted, &c. the ſaid ſixty pounds to the ſaid *John* hath not yet paid, but to pay the ſame to him hath hitherto abſolutely denied, and yet doth deny, to the damage of the ſaid *John* of ten pounds; and thereupon he brings ſuit, &c.

Bill againſt clerk of the king's bench.

In debt on a bond.

And the ſaid *Henry Mills*, preſent here in court in his proper perſon, defends the force and injury, &c. and prays *oyer* of the ſaid writing obligatory, and it is read to him, &c.; he alſo prays *oyer* of the condition of the ſame writing, and it is read to him in theſe words, that is to ſay, The condition of this obligation is ſuch, that if the above-bounden *Henry Mills*, his heirs, executors, or adminiſtrators, do well and truly pay or cauſe to be paid unto the above-named *John Lett*, his executors, adminiſtrators, or aſſigns, the full ſum of thirty pounds of good and lawful money of *England*, together with the intereſt thereof after the rate of ſix pounds *per centum per annum*, at or upon the twelfth day of *July* next enſuing the date hereof, then this obligation to be void, or elſe to remain in full force and virtue; which being read and heard, he the ſaid *Henry*

Oyer of the bond.

LETT *against* MILLS.

Plea, that the plaintiff is a knight, in abatement.

Henry prays judgment of the bill aforeſaid, becauſe he ſaith, that the ſaid *John*, to wit, on *Friday*, the twenty-ſecond day of *October*, in the aboveſaid ſecond year of the reign of the ſaid lady the now queen of *England*, &c. took upon himſelf the order of knighthood, and now is a knight; and this he is ready to verify: wherefore he prays judgment of the bill aforeſaid, and that the ſaid bill may be quaſhed, &c.

Demurrer.

And the ſaid *John* ſaith, that by anything by the ſaid *Henry* above in pleading alledged, the bill of him the ſaid *John* ought not to be quaſhed, becauſe he ſaith, that the plea aforeſaid, by the ſaid *Henry* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are not ſufficient in law to quaſh the ſaid bill of him the ſaid *John* againſt the ſaid *Henry*; to which ſaid bill the ſaid *John* hath no neceſſity, neither is he bound by the law of the land in any manner to anſwer; and this he is ready to verify: wherefore for want of a ſufficient anſwer in this behalf, he the ſaid *John* prays judgment, and that the bill of him the ſaid *John* may be adjudged good, and that the ſaid *Henry* may anſwer to the ſaid bill, &c.

Joinder in demurrer.

And the ſaid *Henry* ſaith, that the plea aforeſaid by him the ſaid *Henry* in manner and form aforeſaid above pleaded, and the matter in the ſame contained, are good and ſufficient in law to quaſh the bill of him the ſaid *John* againſt the ſaid *Henry*; which ſaid plea, and the matter therein contained, he the ſaid *Henry* is ready to verify and prove, as the court, &c. And becauſe the ſaid *John* hath not anſwered to that plea, nor hath hitherto in any manner denied it, he the ſaid *Henry* as before prays judgment, and that the ſaid bill may be quaſhed, &c. But becauſe the court of the ſaid lady the queen now here is not yet adviſed to give their judgment of and concerning the premiſes, day is thereupon given to the parties aforeſaid before the lady the queen at *Weſtminſter*, until next after , to hear their judgment of and concerning the premiſes, for that the court of the ſaid lady the queen now here is not yet, &c.

Reſpondeat ouſter.

Caſe 149.

Lett *againſt* Mills.

Michaelmas Term, 2. Anne, Roll 333.

A plea in abatement, that the plaintiff received order of knighthood, good.

THE defendant pleaded in abatement, that *ſuſcepit ordinem militarem, et jam miles exiſtit.*

And upon demurrer, IT WAS RESOLVED,

FIRST, That *ſuſcepit ordinem militarem* was a very proper way of expreſſing that he had received the order of knighthood. See the ſtatute *de Militibus.*

2 C. 1. Salk. 6. 2 C. 2. Ld. Ray, 1014. Poſt. 306. 1. Mod. 286. Ld. Ray. 853.

SECONDLY,

SECONDLY, "*Miles*," without addition, is to be underſtood of a *knight bachelor*, which is part of a man's name.

"*Miles*" means "a knight bachelor."

THIRDLY, That there needs no *venue* where he was dubbed a *knight*, becauſe any thing that concerns the condition of the perſon ſhall be tried where the action is laid.

In a plea of abatement to the *perſon*, a venue need not be laid. 1. Saund. 49.

FOURTHLY, That if *a knight* be ſued, and not ſo called, it is a good plea in abatement.

A *knight* muſt be ſo ſtyled in law proceedings.

V. 2. Saund. 8. acc. 40, 41.

But it not being ſaid that he was A KNIGHT *tempore exhibitionis billæ*, or *after the laſt continuance*,

A plea that the plaintiff was a *knight*, muſt ſay that he was ſo *at the exhibition of the bill.*

THE COURT ordered a *reſpondeas ouſter.*

* [106]

* Anonymous. Caſe 150.

NOTE, Here it was ſaid, that *a bill* filed againſt an attorney muſt be filed in full Term, and it is not enough it ſhould be on any of the eſſoin-days *(a)*.

A bill againſt attorney muſt be filed in full Term.

Poſt. 114. 175. 2. Salk. 544. 12. Mod. 163. Gilb. K. B. 346. Holloway *v.* Crop, 2. Burr. 1052.

(a) But now *a bill* may be filed againſt an attorney in Vacation as well as in Term time, Lane *v.* Wheat, Mich. Term, 23. Geo. 3. Dougl. 313. *notis*; but if it be filed in Vacation otherwiſe than to avoid the ſtatute of Limitation, the plaintiff will not be allowed his coſts, if the action be ſettled before the enſuing Term, Tidd's Practice, 80.: and if *a bill* be filed againſt an attorney in the Vacation, the day of filing it may be inſerted in the memorandum, Dodſworth *v.* Bowen, 5. Term Rep. 325.

The Counteſs of Bridgewater *againſt* The Duke of Bolton. Caſe 151.

SPECIAL VERDICT upon a *feigned iſſue* out of CHANCERY, to try, Whether the late *Duke of Bolton* did, by his laſt will, deviſe certain fee-farm rents to *J. Earl of Bridgewater* in fee.

A teſtator being ſeiſed of certain *fee farm-rents*, of *lands*, and of *mines*, deviſes his *lands* to *A.* for life, with a remainder in tail; and all his *mines* and five thouſand pounds to his ſon-in-law *B.* "all which I give and deviſe to *B.* his executors and aſſigns, together "with all my plate and jewels, and *all my other eſtate*, real and perſonal, not otherwiſe diſpoſed of, "*to be given by him to his children as he ſhall think convenient, I ſolely truſting to his honour and diſcretion, that he will give them ſuch proviſion as will be neceſſary for them.* AND WHEREAS I have contracted "for the ſale of my *fee farm-rents*, my will is, that if my debts ſhall not be ſatisfied out of my other "eſtate, my executors (whereof *B.* was one) ſhall and may ſell ſome part or all of them for payment of them, notwithſtanding *the rents* are not deviſed by this my laſt will." THE QUESTION was, Whether *B.* was intitled to the *fee farm-rents* in *fee?* And IT WAS HELD, that *the rents* paſſed by the words "all my real and perſonal eſtate;" for the word "*eſtate*" is *genus generaliſſimum*, and includes all things real and perſonal. S. C. 1. Eq. Caſ. Ab. 177. S. C. Holt, 281. S. C. 1. Salk. 236. 3. Mod. 228. 1. Lev. 212. 2. Vent. 285. Aleyn, 28. 2. Danv. 527. Skinner, 194. 562. Poſt. 111. 1. Sal. 234. Ld. Ray. 187. 831. 1325. Prec. Chan. 37. 68. 202. 264. 471. 3. Mod. 92. 10. Mod. 94. 287. 525. 11. Mod. 90. 102. 12. Mod. 592. Gilb. Eq. Rep. 30. 77. Fitz. 151. Comy. Rep. 337. 2. Peer. Wms. 198. 3. Peer. Wms. 26. 56. 61. 91. 295. 322. 356. 2. Ven. 564. 2. Peer. Wms. 524. Caſes T. T. 162. Dougl. 323. 1. Term Rep. 411. 2. H. Bl. Rep. 223. 4. Term Rep. 656. 3. Term Rep. 356.

The

THE COUNTESS OF BRIDGEWATER *against* THE DUKE OF BOLTON.

The ſpecial verdict found, that the ſaid *Duke of Bolton*, at the time of his death, was ſeiſed of ſeveral lead and coal mines, and ſeveral mills in the county of *Weſtmorland*, and of divers fee-farm rents in *Berkſhire*, and of divers other lands and tenements, and made his will *in hæc verba:* FIRST, He gives ſeveral lands and tenements to *Lord W. Pawlet*, with remainder to the firſt and every other ſons in tail, &c. he further gives him eight thouſand pounds to be paid by his executors. Then he gives to *J. Earl of Bridgewater*, his ſon-in-law, five thouſand pounds, and all his mines which he held of the *Earls of Burlington* and *Thanet*, *&c.* And then comes the clauſe in queſtion: "All which I give and "deviſe to my ſaid ſon-in-law *J. Earl of Bridgewater*, his execu-"tors and aſſigns, together with all my plate and jewels, and all "other my eſtate, real and perſonal, not otherwiſe diſpoſed by "this my laſt will, for to be given by him to his children as he "ſhall think convenient, I ſolely truſting to his honour and diſ-"cretion, &c. that he will give them ſuch proviſion as will be "neceſſary for them." And another clauſe was, "WHEREAS "I have contracted for the ſale of my fee-farm rents, my will is, "that if my debts ſhall not be ſatisfied out of my other eſtate, my "executors" (whereof *the Earl* was one) "ſhall and may ſell "ſome part or all of them for payment of them, notwithſtanding "the rents are not deviſed by this my laſt will."

THIS CASE having been three ſeveral times argued at the bar,

HOLT, *Chief Juſtice*, now delivered the opinion of THE COURT thus: Four things are conſiderable upon this will.

FIRST, Whether by this clauſe, whereby the reſidue of *the Duke's* eſtate, both real and perſonal, is deviſed to *the Earl of Bridgewater*, the fee-farm rents do paſs by virtue of the general words, "reſidue of all my real and perſonal eſtate," leaving out the words "not otherwiſe diſpoſed of, &c."

*[107] * SECONDLY, Suppoſe they do paſs, of what eſtate? Whether *in fee* or only *for life?*

THIRDLY, To conſider the words, "not otherwiſe diſpoſed of," together with the former words.

And FOURTHLY, Whether, conſidering other clauſes ſcattered in the will compared with this, the rents will thereby paſs?

AS TO THE FIRST MATTER, The *Duke of Bolton*, after ſeveral diſpoſitions in his will, gives his perſonal eſtate to *the Earl of Bridgewater*, and then gives the reſidue of his eſtate, real and perſonal, to him: ſurely the rents paſs by the word "*eſtate*," for that word is ſufficient to paſs *a freehold* as well as *a chattel*. The word "*eſtate*" is a *genus generaliſſimum* (*a*), predicable of two ſpecies that have their difference, whereby they are divided, that is, *eſtate real*, and *eſtate perſonal*. "Eſtate real" is *genus ſubal-*

(*a*) See Cowper v. Martin, 1. Term Rep. 411.

ternum,

THE COUNTESS OF BRIDGEWATER *against* THE DUKE OF BOLTON.

tenum, and has its ſpecies too; that is, ESTATE REAL *in fee*, or *for life*. And ſo is *eſtate perſonal* in like manner to be branched into *chattel real* and *chattel perſonal*; and it has that difference of a chattel real, not becauſe it is a real eſtate, but becauſe it has a real extraction. If a man ſeiſed in fee make a leaſe for years, the leſſee for years has a chattel real, becauſe his eſtate is derived out of a real eſtate; but ſtill it is not a real eſtate, for it is teſtamentary, and deviſable by will, at the common law, by the owner; ſo that if it were of lands in *knight's ſervice*, or *in capite*, the owner could not deviſe the land for a term; but if he made a leaſe for years of it, then it became a chattel in the leſſee, and conſequently deviſable: ſo that the words "real eſtate" cannot be ſatisfied without a freehold at the leaſt paſs, for a chattel real is no real eſtate. This is no new queſtion; for it appears 1. *Ro. Ab.* 854. *Style*, 493. that the word "*eſtate*" comprehends both freehold and chattels real and perſonal, eſpecially if the words "real "and perſonal" be added. It is true, that by a deviſe of a man's "eſtate real and perſonal" a freehold will paſs, if theſe words come not accompanied with other particular words which expreſs a ſpecies of an inferior nature, and which only can extend to a chattel; and there the generality of this word "*eſtate*" ſhall be reſtrained and explained by the precedent particular words, according to the rule in 2. *Co.* 46. 1. *Saund.* 160. 2. *Saund.* 411. and abundance of other books. I * anſwer, The rule is good and general, eſpecially where the particular words comprehend and expreſs a thing of an inferior nature to the general words ſubſequent, and the general words are put without their dividing differences; for there indeed the generality of them ſhall be controlled by the bounds of the particular precedent words; but where the general words do put the proper difference of particulars, and beſides, take a higher ſpecies than the particulars mentioned before, as in this caſe it does, by the word "*eſtate*," which is a higher word than mentioned in the precedent particulars, and "real and perſonal" the proper difference, there the general words ſhall over-reach the particulars before; as if in the *Archbiſhop of Canterbury's Caſe* (*a*), the words had been, "and all eccleſiaſtical perſons of ſuperior or "inferior rank," they would have taken in archbiſhops, biſhops, &c. A man ſeiſed in fee of lands, and of other lands by mortgage not forfeited, deviſes firſt all his lands in fee to *A.* and all the reſt of his goods, chattels, eſtates, mortgages, debts, &c. to *C.*; it was held (*b*), that no freehold paſſed, and very rightly; for there the word "*eſtate*" came with particular words, without putting the due difference, as is done here. It may be objected, that the word "*reſidue*" is a word of relation, and therefore to be confined by its relation to ſomething given before; and whatever is before given is *perſonal*, therefore the word "*reſidue*" is to be underſtood of perſonal eſtate. But I anſwer, that this word "*reſidue*" is

[108]

(*a*) 2. Co. 46. 447. 1. Roll. Ab. 834.
(*b*) Wilkinſon v. Maryland, Crb. Car.

THE COUNTESS OF BRIDGEWATER *againſt* THE DUKE OF BOLTON.

not to be underſtood as only applicable to the next immediate clauſe of deviſe to *the Earl of Bridgewater*; and ſuppoſe it were ſo, yet that would not hinder *the Earl* from taking an eſtate of freehold, for it muſt refer to all the other clauſes whereby an eſtate is before given; and an eſtate of freehold is deviſed before; why then may not "*reſidue*" relate to it? Suppoſe a man deviſe "the "*manor of Dale* to *A.* and the heirs of his body," and has other lands, and deviſes "*the reſidue* of his eſtate to *J. S.* and his heirs," ſhall not both the reverſions paſs, and relate to the firſt as well as the laſt, as alſo his other lands (*a*)? therefore the word *reſidue*, if it muſt relate, muſt relate to eſtate both real and perſonal (*b*). But for argument ſake, ſuppoſe it ſhould only relate to a thing of the ſame kind that is deviſed to *the Earl* before in this clauſe; a man has an eſtate conſiſting of two parts, that is, real and perſonal; his perſonal eſtate is as much a part of his general eſtate as his real eſtate is; and ſuppoſe he gives ſome of his perſonal eſtate away by will, and in the ſame will gives the reſidue of his eſtate real and perſonal away, ſhould not this paſs the freehold as well as the reſt of his perſonal eſtate? Surely there is no doubt of it (*c*).

Vide Hob. 65.

But it is an objection, that this clauſe is not only in company with a clauſe that gives no more than a perſonal eſtate, but alſo that it gives it to him, his executors and aſſigns, and therefore coming with that clauſe, "all which I give to the ſaid *Earl*, his executors and
* [109] "aſſigns, *together* * *with* my plate and jewels, and all the reſt of "my eſtate real and perſonal," under a *unà cum*, with chattels, with the legal and proper words of limitation for chattels, no more than a chattel ought to paſs by them. But I anſwer, let us firſt conſider how this clauſe "*reſidue of all his real and* "*perſonal eſtate*" is to be applied; whether we ſhall take it in an *accuſative* governed by the verb "*do*," or in the *ablative*, by the *una cum*; and I think it an *accuſative*, and not an *ablative*, and that even in Latin it will be good grammar ſo; in this manner, "*omnia quæ do et lego J. C. B. unà cum gemmis et argent', et totum* "*reſiduum ſtatûs mei realis et perſonalis:*" and this is good ſenſe and grammar, and conſiſtent with the meaning and intent of the teſtator. But ſuppoſe it be put in *the ablative*, the freehold in the rents will paſs; as if a man has a real and perſonal eſtate, and deviſe his perſonal eſtate *unà cum* his real eſtate, the one and the other paſs as fully as if there were expreſs words of deviſe or grant to both of them (*d*). If a man make a feoffment in fee of the manor of *D.* *unà cum* the manor of *S.* and makes livery *ſecundum formam chartæ*, both ſhall paſs, though it be under a *unà cum*: If a man is poſſeſſed of a term for years of ſuch a houſe, and he de-

(*a*) If a teſtator deviſe "all he is "worth," it will paſs real as well as perſonal eſtates, Huxtep *v.* Brooman, 1. Bro. Caſ. in Ch. 437.

(*b*) See Davis *v.* Saunders, 2. Bl. Rep. 737. Cowper, 420.

(*c*) See Tanner *v.* Morſe, Caſes Temp. Talb. 284. S. C. under the name of Tanner *v.* Wife, 3. Peer. Wms. 295. and Doe on demiſe of Bucket *v.* Chapman, 1. H. Bl. Rep. 223.

(*d*) Stukeley *v.* Butler, Hob. 174, 175. Moor, 880.

viſes

vifes his term for years *und cum* his houſe called *B.* which is fee, they ſhall both paſs; and there is no difference between where words are particular, and where they are general, if the general words cannot be ſatisfied without paſſing the real eſtate, as here they cannot.

SECONDLY, Whether in caſe a freehold in the rents do paſs, it is of an eſtate in fee, or for life? AND WE ALL HOLD, that an inheritance paſſes to *the Earl of Bridgewater*. If a man be ſeiſed in fee, and deviſe "his *eſtate*," the inheritance ſhall paſs without any other circumſtance to manifeſt his intent; merely by deviſing his *eſtate (a)*. Without this conſtruction the words of the will cannot ſtand; for the word "*eſtate*" implies a fee ſimple, for that is the general eſtate that every man is ſuppoſed to be ſeiſed of *(b)*. "Eſtate" comes from "*ſtando*," becauſe it is fixed and permanent, and imports the moſt abſolute property that a man can have. It is true, an eſtate for life is an eſtate, but it is with an addition; and "*eſtate*" in a deed muſt be intended of an abſolute fee-ſimple; *ideo* in a will, &c. Moſt certainly in grants it would not paſs a fee, becauſe the law appoints, that let the intent of the parties be ever ſo fully expreſſed and manifeſted in grants, without the word "*heirs*" a fee ſhall not paſs *(c)*. If a feoffment be made "to *J. S.* to have to "him in fee-ſimple," which words can have no other ſenſe than to paſs *an inheritance*, yet an eſtate only *for life* ſhall paſs *(d)*; and yet "fee-ſimple" in pleading is that which deſcribes the inheritance, as *ſeiſitus in dominico ſuo ut de feodo (e)*; but in *a will* it is not ſo. The reaſon is, becauſe a will for lands is a new conveyance created by the ſtatute of 32. *Hen.* 8. c. 1. 7. 1. whereby a man is enabled to deviſe all his ſocage land "at his *will* and "pleaſure." Now when a man manifeſtly ſhews his intent, that the deviſee ſhall have the inheritance, or a * greater eſtate than for life, the ſtatute that impowers him to deviſe his eſtate "at his "pleaſure," ſhall make his diſpoſition good, without tying him up to the forms of common law; and this is agreeable to the common law in caſes where eſtates were deviſable by cuſtom; for there expreſs words of limitation are not neceſſary; for a deviſe of ſuch lands "to a man, *et ſanguini ſuo*," paſſed an eſtate tail *(f)*.

* [110]

In the next place, there are words of relation; it is not only "*the eſtate*," but "*my eſtate*." The *Duke of Bolton* was ſeiſed in fee of theſe rents, and he deviſes "his *eſtate*," that is, he gives that eſtate that was his, and that muſt be conſtrued a fee, for if a man aſk the queſtion, What *the Duke* gives *the Earl*? the anſwer is, "*his eſtate*." If it be aſked, "*What eſtate?*" it will be anſwered, "*fee*." Now to conſtrue this to be only *for life*

1. Sal. 234. 236. Cro. Car. 129. 293. 1. Jon. 195. Hob. 75. See the caſe of Bertie and Faulkland, 3. Chan. Caſes.

(a) See 1. Roll Abr. 835. pl. 5. 3. Mod. 45. and Cowper *v.* Martin, 1. Term Rep. 411. Fletcher *v.* Smiton, 2. Term Rep. 656.
(b) Co. Lit. 9.
(c) Litt. Tenures, ſect. 1.
(d) 4. Com. Dig. "Eſtates" (A. 2.)
(e) Litt. Tenures, ſect. 10.
(f) See 1 Roll Abr, 834. pl. 17.

THE COUNTESS OF BRIDGEWATER *against* THE DUKE OF BOLTON.

or *in tail*, would directly contradict the teſtator's words; for then an eſtate for life would not be *the Duke's* eſtate, but a new and a leſs eſtate; for it was an eſtate *in fee*, and you would have an eſtate *for life* paſs, which would be a new eſtate. And though there be no difference between deviſing "his eſtate," and deviſing "all his eſtate," yet the word "*all*" makes the deviſe much more comprehenſive; and if he give "*all* the reſidue," he muſt give *a fee-ſimple*, for an *eſtate for life* were not *all*; for every eſtate in fee conſiſts both of *freehold* and *inheritance*, and therefore if he did not give *the fee*, he did not give *all*. It is objected, that the word "*eſtate*" is underſtood not of *the intereſt* which a man has, but of *the thing* itſelf: if a man give by will "all his *eſtate* in ſuch "a houſe," then *the intereſt* paſſes; but if he deviſe "all his "eſtate," without aſcertaining in what, *the thing*, and not *the intereſt*, ſhall paſs. But I do not think ſo; for the word "*eſtate*" does in truth comprehend *the thing* and *the intereſt*; for it is impoſſible that one ſhould have the original intereſt in a thing, and not have the thing itſelf, and ſtill the word in its propereſt ſenſe imports *the intereſt*. Suppoſe I covenant with *John Stiles* to convey him all the covenantor's eſtate in *Middleſex*, and the covenantor make him a charter by words of grant of "*totum ſtat. &c.*" will any man think the covenant ſatisfied? No ſure, for that obliges him to convey a fee ſimple; therefore if he will perform his covenant, he muſt go in his grant beyond the words of the covenant. We know in pleading, that the word "*eſtate*" imports a fee, as in *a formedon* if the tenant plead that *John Stiles* was infeoffed with warranty, *cujus ſtatum* the tenant has, that ſhall be underſtood of a fee. But for another reaſon this muſt be *a fee*. And here I will quit the word "*eſtate*," and ſuppoſe the deviſe to be of his *fee-farm rents*; and ſo I hold a fee-ſimple would paſs as this deviſe is, for this reaſon: for *the Earl* is injoined to make proviſion for his younger children out of the eſtate deviſed to him. Hob. 65. Suppoſe a man ſeiſed of the *manor of Dale*, deviſes it without any limitation, to make proviſion for *J. S.* in ſuch manner as he ſhall think convenient, and declares that he leaves it entirely to him: Surely a very good *fee* will * paſs; for in all caſes where lands are deviſed to a particular purpoſe, and the death of the deviſee may prevent that purpoſe, there the deviſee will have a fee; and that is *Collier's Caſe* (*a*). And if here *the Duke* had appointed a certain ſum to be paid, it had been within the expreſs words of *Collier's Caſe*; but though that be not done, yet here is a truſt repoſed in him; and how can he diſcharge that truſt if he has only an *eſtate for life*? A deviſe to a man "to diſpoſe at will and "pleaſure," is *a fee* (*b*), and this is "to diſpoſe as he pleaſes." A deviſe was made of land to his wife "to diſpoſe thereof upon herſelf and "her children;" and it was held, that ſhe had a fee ſubject to a particular truſt for the children (*c*).

* [111]

Cro. Eliz. 378. 3. Chan. Rep. 102, 103, &c.

(*a*) 6. Co: 16.

(*b*) Latch, 144. See alſo 2. Com. Dig. "Chancery," (4. W. 2.)

(*c*) Moor, 57. pl. 165. See alſo 2. Com. Dig. "Chancery," (4. W. 2.) 3. Com. Dig. "Deviſe," (N. 4)

THIRDLY,

THE COUNTESS OF BRIDGEWATER *against* THE DUKE OF BOLTON.

THIRDLY, We will conſider this clauſe as qualified by the words "not otherwiſe diſpoſed of;" that is, taking it for granted that a fee paſſes by the words "the reſidue of all my eſtate real "and perſonal," how will it be if the words "not otherwiſe diſ- "poſed of" be added? It has been inſiſted on, that theſe rents are "otherwiſe diſpoſed of" by the will; for *the Duke* deviſes, "that his executors, if occaſion ſhall be, ſhall ſell any part, or all "of them, for payment of his debts and legacies:" ſo this is ſaid to be diſpoſition enough to make them out of the general clauſe of the will. But ſurely if this authority given to the executors be not a diſpoſition, then the rents are not exempted out of the words of the general clauſe; and it is plain, that giving an executor power to ſell, is no diſpoſition; for the executor in this caſe takes no eſtate, but has only *an authority*, which when executed, and the executor, in purſuance thereof, has made a ſale of the rents, then and not before are they diſpoſed of, and excepted out of the general clauſe of the will; but if the executors do not ſell, or if there be no occaſion for them to ſell, in which caſe they cannot ſell, then there is no diſpoſition. One, ſeiſed of divers meſſuages in ſeveral pariſhes, deviſed ſome of them in fee, and ſome for life, and then deviſed all his meſſuages not before diſpoſed of; and it was held (*a*), that the reverſion of the houſes deviſed for life would paſs. Indeed, the executors, in caſe of deficiency, are enabled to diſpoſe of theſe rents; but if they do not, or if there be no occaſion, they are not diſpoſed of, and therefore given to *the Earl*. *A.* ſeiſed of the manor of *Dale*, and other lands, deviſed part of them for ſix years, and then deviſed the reſt; and it was held (*b*), that by the word "reſt" the reverſion of the part deviſed for years paſſed. If a man ſeiſed in fee of ſeveral lands and tenements in *Dale*, deviſe all his lands to *B.* and his heirs; "but if my perſonal eſtate be "not ſufficient to pay my debts, then I intend that *Black-Acre* ſhall "not paſs;" if the perſonal eſtate be ſufficient, it ſhall paſs. It is plain the executor had not power to ſell them, but upon a *condition precedent*; that is, in caſe his debts and legacies could not be paid within ſix months after his death: and pray how comes the now *Duke of Bolton* to claim them if they were diſpoſed of by the will? If they are diſpoſed of, he can have no claim; if not, they are deviſed to *the Earl:* but who ſhall have them during the ſix months, * until it be known whether they ſhall be diſpoſed of, or not? Surely *the Earl* ſhall, for until then they are not diſpoſed of. And where, in another clauſe of the will, *the Duke* takes notice that he has not diſpoſed of theſe rents by theſe words, "notwithſtanding that I have not deviſed them by this my laſt "will;" I anſwer, that it is plain from what has been ſaid, that, by the general words, they are diſpoſed of. But then what can be the meaning of theſe words? it muſt be, notwithſtanding that they are not particularly deviſed to that purpoſe, or otherwiſe than generally; and it is no new matter to reject looſe words out of a

Ante, 106.

* [112]

(*a*) 3. Vent. 285. (*b*) Allen, 28.

THE COUNTESS OF BRIDGEWATER *against* THE DUKE OF BOLTON.

will, rather than the intent of the teſtator ſhould be fruſtrated, *Hob.* 65. So theſe words may be rejected here. But ſome will ſay, Surely it was not the intent of *the Duke* to deviſe theſe rents to *the Earl*, ſince he takes notice that he had contracted for the ſale of them, and the deviſe to *the Earl* could not have prevented the contracts taking effect. I anſwer, It is plain, notwithſtanding the ſale or contract, that he did deviſe them; for if the debts and legacies were not paid within ſix months, he deviſes his executors to ſell them; and in caſe he, with whom the contract is made, do not perform, then he deviſes to *the Earl*; and if the rents had been ſold according to the contract, it had been no prejudice or diminution of *the Earl's* legacy, for the ſurpluſage after debts and legacies paid would come to him as reſiduary legatee.

FOURTHLY, Conſidering the laſt clauſe of the will, whereby he orders theſe rents in caſe of deficiency, &c. to be ſold, and the remainder thereof, after the debts and legacies paid, to go to *the Earl*; I ſay, conſidering this clauſe, with other ſcattered clauſes in the will, *the rents* thereby will paſs. Some doubts have been made, whether the word "*remainder* of my rent" be ſufficient to paſs theſe rents: FIRST, becauſe *a remainder* is a reſidue of ſomething, ſo that if there be nothing ſold, nothing can be a reſidue, or a remainder: this depends upon the conſtruction of the word "*remainder*," whether there be a neceſſity to ſell to make a remainder. But I do not think the word "*remainder*" here is to be taken for *a remnant* of a *totum*, when part is extracted from it; for if the rents are not ſold, then they remain unſold; and the word "*remainder*" ſhall be underſtood for the rents remaining unſold. This word "*remainder*" made ſome diſpute, which laſted for above an age: it was a great queſtion, Whether there could be *a remainder* of a thing created *de novo* (*a*); for there cannot be a remainder of a thing that never had been before. Since, a more reaſonable conſtruction has been made. If a man by deed grant *a rent* "to *A.* and the heirs of his body, remainder to *B.* and his "heirs," this is a good remainder (*b*).

1. Lev. 144. Cart. 52. 2. Keb. 29. 55. 84. 2. Salk. 577. Plo. 35. a. 35. E. 4. 9. *contr.*

* [113] * The deviſe is here of the *fee-farm rents*, to make thereout ſuch annual payments as the deviſee pleaſes; if it were a ſum *in groſs*, it would be *a fee* according to *Collier's Caſe* (*c*), and *Spicer's Caſe* (*c*). If only an eſtate for life had come to *the Earl*, the ſecurity of payment of the annuities muſt be diminiſhed, and can it be intended but that *the Duke* intended the ſecurity ſhould continue as long as the annuities were to be paid? which could not be, if *the Earl* had only an eſtate for life; for ſuppoſe

(*a*) Plowd. 35.

(*b*) 1. Sid. 285. See alſo 2. Mod. 72. 3. Mod. 280. Dyer, 321. 3. Peer. Wms. 330. and Co. Lit. 241. a. note (4.) 298. a. note (2.).

(*c*) 6. Co. 16. See alſo Moor, 852. Palmer, 392. and the caſe of Spicer v. Spicer, Cro. Jac. 537.

they,

they, to whom the annuities are payable, ſhould outlive *the Earl?*

ET PER TOTAM CURIAM, the plaintiff had judgment (*a*).

(*a*) As to the operation of the word "eſtate," ſee Cheſhire *v.* Painter, 2. Peer. Wms. 335. Barry *v.* Edgworth, 2. Peer. Wms. 523. Tanner *v.* Wiſe, 3. Peer. Wms. 295. S. C. Caſes T.T. 284. Goodwin *v.* Goodwin, 1. Vezey, 228. Frogmartin *v.* Wright, 3. Wils. 414. Mance *v.* Tall, Ambler, 181. Hogan *v.* Jackſon, Cowp. 352. Right *v.* Sidebotham, Dougl. 734. Holdfaſt *v.* Martin, 2. Term Rep. 411. Fletcher *v.* Smiton, 2. Term Rep. 656. Doe *v.* Chapman, 1. H. Bl. Rep. 223. Palmer *v.* Richards, 3. Term Rep. 356. Doe *v.* Woodhouſe, 4. Term Rep. 92. Andrew *v.* Southouſe, 5. Term Rep. 292.

Carleton *againſt* Mortagh. Caſe 152.

Michaelmas Term, 2. Anne, Roll 76.

If *want of an original* be aſſigned for error, and a *releaſe* be pleaded, yet a *certiorari* to inform the Court whether there was any *original*, or not, may be awarded, in the ſame manner as if *in nullo eſt erratum* had been pleaded; but the party cannot demand it of right. S. C. poſt, 296.

WANT of an original was aſſigned for error, and a releaſe of error pleaded.

The doubt was, Whether the Court, after a releaſe of error pleaded in this caſe, might award *a certiorari ad informandum conſcientiam Curiæ*, to be certified if there were an original to ſupport a judgment for a juſt debt?

AND IT WAS AGREED, that the party could not demand it of right after this plea.

A diverſity was endeavoured at, that where the party himſelf expreſsly confeſſes or admits a thing, the Court ought not to deſire any further information; but that where the admittance is not expreſs, but implied, or by *nient dedicere*, it is otherwiſe.

Againſt which, HOLT, *Chief Juſtice*, put this caſe: In annuity, "*riens arriere*" is pleaded; the jury find, that there was no rent behind, and it appears to them that there was no grant; yet they cannot find a *non conceſſit* contrary to the admittance of the party: and he ſaid, if error be aſſigned which in truth is no error, and the defendant plead a releaſe of errors which is found againſt him, yet, the error aſſigned being bad, judgment ſhall be affirmed, becauſe the iſſue taken upon the releaſe was impertinent.

S. C. 1. Salk. 268. S. C. 3. Salk. 399. S. C. Holt, 275. S. C. 2. Ld. Ray. 1005. Poſt. 174. 235. 1. Salk. 267, 269, 270. Hob. 164. 1. Cro. 84. Moor. 700. 1. Leon. 22. Hob. 54. 2. Lev. 234. 5. Com. Dig. "Pleader," (3. B. 19.)

POWELL, *Juſtice*, quoted the *Year-Book* (*a*), that upon a releaſe of error, if it be found againſt the defendant, yet the Court ſhall proceed to examine the judgment; but if it be found for the defendant, the judgment ſhall be to bar the plaintiff of his writ; but if there be no error at all, and the releaſe be found againſt him, the judgment ſhall be affirmed.

And it was put in the paper to be ſpoke to ſolemnly.

(*a*) By LITTLETON, *Juſtice*, in the caſe of Moyle *v.* Danby, 8. *Edw.* 4. pl. 8.

CARLETON *againſt* MORTAGH.

At another day, WARD quoted the authorities in the margin (*a*), which were all upon the ſame opinion with the *Year-Book* before quoted by POWELL, *Juſtice* (*b*).

And being moved again the laſt day of Term,

HOLT, *Chief Juſtice*, ſaid, that if the plaintiff in error aſſign that for error particularly which is not ſo, or the general error, and the defendant plead not "*in nullo eſt erratum*," but a releaſe, which is either inſufficiently pleaded, or if well pleaded, upon iſſue found againſt him, there the Court ought not to reverſe the judgment without examining if the error be good: now why ſhould not we have *a certiorari ad informandum conſcientiam*, though the party of right cannot demand it (*c*). Suppoſe want of original be aſſigned for error, and it be returned, that there is no original of that Term, the defendant in error, if there be an original of another Term, ought to make ſuch a ſuggeſtion on THE ROLL, of an original of another Term; for if he plead "*in nullo eſt* "*erratum*," he is thereby concluded from making ſuch a ſuggeſtion; yet the Court may award *a certiorari*, becauſe there may be an original of another Term.

[114]

1. Salk. 269, 270. Poſt. 206.

Sed adjournatur till next Term (*d*).

(*a*) 1. Roll. Abr. 789. Cro. Jac. 415. 2. Jones, 152. 373. Bro. Abr. "Error," 165. Year Book 7. *Edw.* 4. pl. 16. 6. *Edw.* 4. pl. 3. 8. *Edw.* 4. pl. 8. 9. *Edw.* 4. pl. 38.

(*b*) 8. *Edw.* 4. pl. 8.

(*c*) Biſhop's Caſe, 5. Co. 1. Jones, 239.

(*d*) See this caſe moved again, poſt, 206. where it is determined by three Judges, againſt the opinion of HOLT, *Chief Juſtice*, that the Court may in this caſe grant *a certiorari* to inform the conſcience of the Court: and by S. C. 2. Ld. Ray. 1006. the writ was afterwards granted accordingly.

Caſe 153. Anonymous.

Privilege pleaded. 1. Salk. 1. 4. 30. 2. Salk. 515. 545. Ld. Ray 135. 337. 898. 1173. 11. Mod. 167. Stra. 864.

AN ATTORNEY of the common pleas pleaded to the juriſdiction of the court.

PER CURIAM. He ſhall not be *ſworn* to his plea, nor need the *writ of privilege* be ſet out at large: and if matter of fact be pleaded in *abatement* (*a*), and found againſt the defendant, judgment final ſhall be given.

(*a*) See Camerford v. Price, Dougl. 314. *note*.

Caſe 154. Anonymous.

If a trader ſell goods upon credit, the property is in the *vendor*, although the *vendee* give a falſe account of himſelf.

A MAN comes to a merchant, or other dealer, and by *falſe inſinuations*, and account of himſelf, prevails with the merchant to *ſell* him goods upon *tick*.

Ante, 105.—1. Salk. 379. Ld. Ray. 1013.

HOLT,

HOLT, *Chief Juſtice*, ſeemed to incline, that that was not ſuch *a cheat* as would alter the property (*a*).

(*a*) But ſee the caſe of Parker *v.* Patrick, Eaſter Term, 33. Geo. 3. where it is decided, that if goods are obtained by falſe pretences, and pawned without notice of the fraud, and on the offender being convicted of the cheat, the original owner get poſſeſſion of his goods again, the pawnbroker may maintain an action of trover againſt him to recover them back. 5. Term Rep. 175.

The Queen *againſt* Tracy. Caſe 155.

After an indictment, &c. how defendant's plea may be received. S. C. ante, 30. S. C. poſt. 178. S. C. 3. Salk. 192. S. C. Holt, 706.

PER CURIAM. After an indictment by THE GRAND JURY, a plea is not to be received in the office (*a*), without the defendant gives ſecurity to try it at his own charges.

But if the defendant come into court, and plead, his plea ſhall be received, but he ſhall be committed if he do not give ſecurity to try it.

If the defendant give ſecurity to try it, it muſt be at his own charge; if he go to gaol, it muſt be at the proſecutor's charge.

(*a*) See Rex *v.* Haddock, that on an indictment for a *mayhem* laid to be done feloniouſly, the defendant need not be brought to the bar to plead, but may deliver his plea into the office. 2. Stra. 1100, Andr. 137.

Emerton *againſt* Selby. Caſe 156.

Preſcription of common for cattle *levant et couchant*, upon a cottage, is good; for a cottage muſt have land belonging to it. S. C. 1. Salk. 169. S. C. Holt, 174. S. C. 2. Ld. Ray. 1015. 3. Keb. 44. 1. Bulſt. 90. 2. Brownl. 101. Vaugh. 253. Co. Lit. 5. 2 Inſt. 736. Co. Ent. 749. Ld. Ray. 726. 12. Mod. 35.

A VOWRY was for common, ſetting forth a preſcription of common for cattle *levant et couchant* upon ſuch A COTTAGE.

PER CURIAM. It is good to *a meſſuage* or to *a cottage*, for cattle *levant* or *couchant*; but it was queſtioned in the year 1653, whether it could be good of common without number; and the ſame has been of late in the common pleas, but nothing done in it. A *cottage* implies a court and backſide, for a cottage with leſs than four acres of land, is againſt the ſtatute of 31. *Eliz.* c. 7. (*a*).

* HOLT, *Chief Juſtice*, ſaid, that he had known *levancy* and *couchancy* tried in an iſſue (*b*) before HALE; and that HALE ſaid, the fothering cattle in the backſide would ſuffice.

And judgment here for the avowant.

And PER CURIAM, It would be hard to defeat it, in caſe it were preſcribed to common without number (*c*).

12. Mod. 53. 72.

(*a*) Repealed by 15. *Geo.* 3. c. 32.
(*b*) Winch. Entries, 972.
(*c*) See Patrick *v.* Lowre, 2. Brownl. 101. Daniel *v.* Hanſlip, 2. Lev. 67. Richards *v.* Squib, 1. Ld. Ray. 726. Hockley *v.* Lamb, 1. Ld. Ray. 726. Scholes *v.* Hargreaves, 5. Term Rep. 46.

Case 157. Morgan *against* Tomkins.

On outlawry on an indictment being reverſed, the *indictment* ſtands.
S. C. Holt, 402.

BY THE COURT. If there be an outlawry upon an indictment, and the outlawry is afterwards ſet aſide, the indictment ſtands good and open to proceed upon: but if judgment be upon an indictment by *nil dicit*, or any other judgment by the Court, and that be reverſed, all is ſet at large, and there is an end of the indictment.

Caſe 158. Anonymous.

If a *traverſe* be tendered to an inquiſition of forcible entry, *reſtitution* ſhall not be granted.
Salk. 260, 588.
4. Com. Dig. "Forcible Entry," (D. 7.)

IT has been held in KELYNGE's time, that if a forcible entry were traverſed, yet there ſhould not be a reſtitution, in the caſe of *the King v. Carle (a)*. But the contrary has been held ſince, and before; and that there is no way to prevent reſtitution, but by *certiorari*, or pleading that the party had poſſeſſion for three years before (*b*).

(*a*) (*b*) See 31. *Eliz.* c. 11.

Caſe 159.

Execution upon *habere facias poſſeſſionem*.
Ante, 27.
Poſt. 298.

Anonymous.

PER HOLT, *Chief Juſtice*. Upon an *habere facias poſſeſſionem*, the execution is not complete until the bailiff deliver the poſſeſſion, and is gone.

Caſe 160. Anonymous.

Departure in pleading.
1. Salk. 222.
5. Com. Dig. "Pleader," (F. 11.)
4. Term Rep. 419.

PER HOLT, *Chief Juſtice*. If a man lay a day in his declaration that is not material, and the defendant, by his plea make it material, and then the plaintiff, in his replication, varies from the day in the declaration, it will be *a departure*; otherwiſe if the day had not been made material by the plea.

Caſe 161. Walden *againſt* Holman.

If a man ſued by the name of *Benjamin* plead in abatement that he was baptized by the name of *John*, with A TRAVERSE that the ſaid *John* was ever known by the name of *Benjamin*, the plea is bad.
S. C. Ld. Ray. 1015. S. C. 1. Salk. 6. S. C. Holt, 492. 563. Cro. Eliz. 897. Cro. Jac. 558. 2. Brownl. 48. Poſt. 225. Noy, 135. 2. Roll. Abr. 135. 4. Mod. 347. Ld. Ray. 118. 249. 509. 1178. Stra. 556. 816. 1218. 1. Lut. 10. 3. Term Rep. 660.

HOLMAN was ſued by the name of *Benjamin Holman*, and pleaded in *abatement*, that he was baptized and always known by the name of *John*; ABSQUE HOC that he the ſaid *John* was ever called or known by the name of *Benjamin Holman*. The plaintiff replies, that he was known by the name of *Benjamin* from the time of his baptiſm. To which the defendant demurs.

It was urged, that the material part of the plea was, that he was baptized by the name of *John*; and if ſo, the plaintiff ought to anſwer that; for if the defendant were baptized by the name of *John*, he could not be known by any other name of baptiſm,

ſm, for one can have but one name of baptiſm; and the ABSQUE HOC coming after that, which is a material plea, is frivolous, and therefore not to be regarded.

And to this opinion POWELL, *Juſtice*, ſtrongly inclined, for he thought that to ſay that he was baptized by another name, without more, was a good plea in *abatement*, and therefore the reſt was nugatory (*a*).

*HOLT, *Chief Juſtice*, and the reſt of THE COURT, *contra*: for admitting that it might be relied upon for a plea that he was baptized by ſuch a name, yet that is not done here, but it is only made an inducement to a traverſe, which matter of traverſe is not immaterial, but would be a good plea in *abatement*; for it is a good plea in *abatement* for a defendant to ſay that he was known and called by ſuch a name, though he never was baptized, as many thouſands in *England* never were: nor is it true to ſay that one baptized by the name of *John* cannot be known by another name. *Sir Francis Gawdy* acquired a new name by his *confirmation* (*b*), without, as HOLT, *Chief Juſtice*, ſaid, loſing his *Chriſtian name*; at leaſt he ſaid he was not ſatisfied that his *name of baptiſm* did ceaſe upon his taking a new *name of confirmation*, as POWELL, *Juſtice*, would have it (*c*). * [116]

BROTHERICK at the bar remembered a caſe wherein he was of counſel, in which it was held, that it is not a good plea in *abatement* for a defendant to ſay that he was baptized by another name, without ſhewing likewiſe that he was always known by it, and not put the plaintiff to ſhew how his name was altered to enable him to ſue them.

DARNELL, *Serjeant*, affirmed the ſame thing.

And judgment was given to *anſwer over*.

(*a*) See Jones *v.* Macquillin, 5. Term Rep. 195.
(*b*) See Co. Lit. 3. a.
(*c*) See Diſply *v.* Sprat, Cro. Eliz. 57. Fermor *v.* Dorrington, Cro. Eliz. 222. Watkins *v.* Oliver, Cro. Jac. 558. Blunt *v.* Sneſſon, Cro. Jac. 116. See alſo 2. Roll. Abr. 135. 5. Co. 43. Poph. 57. Noy, 135. 1. Brownl. 47. the Year-Books 3. *Hen.* 6. pl. 26. 14. *Hen.* 7. pl. 11. and Bro. Abr. "Miſnomer," 2. 4. 7. 43.

Roſewell *againſt* Pryor.

Caſe 162.

MIDDLESEX, *to wit.* } NATHANIEL ROSEWELL complains of *Samuel Pryor* and *Richard Avery* in the cuſtody of the marſhal, &c. for this, that whereas the ſaid *Nathaniel*, on the firſt day of *June* in the ninth year of the reign of

Caſe for ſhopping up of lights (*a*).

(*a*) It is not ſaid ancient meſſuage, neither ancient windows. And after verdict this was moved in arreſt of judgment. But by the whole Court, it being after a verdict, it ſhall be intended that it was given in evidence at the trial, that the houſe and windows were ancient. But WRIGHT, *Serjeant*, and NORTHEY, were of opinion, that the declaration would have been good upon a demurrer. Salk. 460. 714. Mod. Caſes, 416. Pract. Reg. 16, 29.

the

Rosewell against Pryor.

the lord *William the Third*, now king of *England*, &c. and continually from thence hitherto was poſſeſſed and yet is poſſeſſed of and in a meſſuage ſituate and being in the pariſh of *St. Martin in the Fields*, in the county of *Middleſex* aforeſaid, for a term of divers years then and yet to come and unexpired, and of twenty-one windows in and upon part of the ſouth ſide, and of eight windows in and upon part of the eaſt ſide of the ſaid meſſuage, in and through which ſaid windows light into the ſaid meſſuage, on the ſaid firſt day of *June* in the ninth year aboveſaid, was let and was accuſtomed to be let, and then and yet ought to be let for the enlightening of his ſaid houſe, they the ſaid *Samuel* and *Richard* not ignorant of the premiſes, but maliciouſly intending and contriving to deprive him the ſaid *Nathaniel* of the uſe and benefit of the ſaid ſeveral windows, afterwards, to wit, the ſaid firſt day of *June* in the ninth year of the reign of the ſaid lord the now king, at the ſaid pariſh of *St. Martin in the Fields* in the county aforeſaid, a certain edifice ſo near the ſaid windows in the ſaid houſe of him the ſaid *Nathaniel* built and erected, and from thence until the firſt day of *October* then next following continued, and thereby the ſaid windows were ſtopped up and darkened, whereby the ſaid *Nathaniel* was deprived of and loſt the uſe and benefit of the ſaid windows from the ſaid firſt day of *June* in the ninth year aboveſaid until the ſaid firſt day of *October* then next following; whereby the ſame *Nathaniel* ſays that he is prejudiced, and has damage to the value of one hundred pounds; and therefore he produces the ſuit, &c.

Not guilty pleaded, and verdict and judgment for the plaintiff.

Caſe 162.

Roſewell *againſt* Pryor.

Michaelmas Term, 13. *Will.* 3. *Roll* 362.

In an action for ſtopping the plaintiff's lights, it is ſufficient to declare that he was *poſſeſſed* of ſuch a meſſuage for years, and *had and ought to have* ſuch lights, without ſtating that the *meſſuage* and the *lights* were *ancient*.

CASE for ſtopping the plaintiff's lights. The declaration was, that the plaintiff was *poſſeſſed* of ſuch a meſſuage for a certain term of years, *et habuit et habere debuit* ſuch and ſuch lights thereunto.

The queſtion was, Whether this was a good declaration, without ſaying that it was an *ancient meſſuage* with *ancient lights?*

HOLT, *Chief Juſtice*. If a man have a vacant piece of ground, and build thereupon, and that houſe has very good lights, and he lets this houſe to another; and after he builds upon a contiguous piece of ground, or lets the ground contiguous to another, who builds thereupon, to the nuiſance of the lights of the firſt houſe; the leſſee of the firſt houſe ſhall have an action upon this caſe againſt ſuch builder, &c. for the firſt houſe was granted to him with all the eaſements and delights then belonging to it: And IT

S. C. 2. Salk 459. S. C. Comb. 481. S. C. Carth. 454. S. C. 12. Mod. 215. 635. S. C. Holt, 500. S. C. 1. Ld. Ray. 392, 713. S. C. Lilly's Ent. 81. 516. Poſt. 193. 311. 313. Hob. 131. 9. Co. 58. 1. Vent. 237. 2. Lev. 194. 1. Mod. 55. Hutt. 130. 5. Com. Dig. "Pleader" (C. 39.). 1. Term Rep. 428. 3. Term Rep. 766.

WAS

WAS AGREED, that formerly the way was to declare of *ancient lights* and *ancient meſſuage*, but now that was altered. *Vide* the Caſe of *St. John v. Moody* (*a*), PER CURIAM. ROSEWELL *againſt* PAYOR.

Judgment was given for the plaintiff.

(*a*) 2. Vent. 274. 2. Lev. 148. 3. Keb. 528. 532.

* Elwis *againſt* Lombe. Caſe 163.

In treſpaſs *vi et armis* for taking the plaintiff's goods in *Dale*, the defendant cannot plead in juſtification generally, that the place WHERE is his *freehold*, and that the goods were there *damage feaſant*.

ERROR of a judgment in *treſpaſs* in the common pleas, where it was for *vi et armis* taking away *ten mattocks* of the plaintiff in *R.* The defendant, as to nine, pleads *not guilty*; and as to the tenth, *actio non, quia locus in quo* is his *liberum tenementum*, and that the mattock was there *damage feaſant*. And upon general demurrer

The ſingle queſtion was, Whether this general way of pleading *liberum tenementum*, without ſhewing any further certainty, be good?

And judgment was for the plaintiff in the common pleas.

S. C. 2. Salk. 453. 1. Keb. 433. 2. Keb. 57. 3 Keb. 286. 3. Lev. 203, 204. Stra. 5. Ld. Ray. 707. 923. Cro. Eliz. 492. Bull. N. P. 92. Carth. 176. 5. Com. Dig. "Pleader" (3, M. 34.). 1. Term Rep. 478. Bull. N. P. 17. 2. Term Rep. 172.

SALKELD now argued *for the plaintiff in error*, the general error being aſſigned:—Either the *liberum tenementum* muſt take in all the vill of *R. viz.* that all the vill is the freehold of the defendant, and then without queſtion the plea will be good; or it muſt be taken of a particular place not certainly known or deſcribed within *R.*; and take it to be the laſt, and ſo the more ſtrongly againſt him, yet it will be well, eſpecially upon a general demurrer. The plaintiff, in his replication, might have aſcertained the place with the ſame advantage to himſelf as if the defendant had done it in his plea, by making a *novel aſſignment*. The bar is as certain as the declaration, and leſs certainty is required in *a bar* than in *a declaration*, eſpecially when *the bar* is *a common bar* (*a*). Wherever the plaintiff may be general in his writ and count, the defendant may be as general in his plea; and if the plaintiff look for more certainty, he himſelf muſt make it in his replication. Before the ſtatute of 27. *Eliz.* c. 5. the old books run both ways; that is to ſay, the *locus in quo* is an acre of land in *Dale*, *liberum tenementum* of defendant, as they would have us have done here; or elſe generally *liberum tenementum*, as we have ſaid. The Year Book 39. *Hen.* 6. 6. *a.* is full in point for me; and in the Year Book 4. *Ed.* 3. 11. *b.* and *Fitz. Bar*, 20. it is that in *clauſum fregit*, or *de bonis aſport.* "*ſon franktenement*" is a good plea. Indeed, ſome Books take this difference, that where the plaintiff ſhews the certainty of his title, there the defendant ought to be certain and particular in his plea, and to aſcertain the place; otherwiſe where the plaintiff does not ſhew the certainty of his title. And in ſuch caſe, if he plead *liberum tenementum* generally, he need not ſhew any

(*a*) Certainty to a *certain intent in general* is all that is requiſite in *counts*, replications, indictments, and returns to writs of *mandamus* and *habeas corpus*. Certainty to a *common intent* is ſufficient in pleas in *bar*. But certainty to *a certain intent in every particular* is neceſſary in eſtoppels. Dougl. 158, 159.

more

Lewis against Lowne.

de ſon aſſault demeſne, he may make a *new aſſignment* of the other battery.

And by THE WHOLE COURT the judgment was affirmed (*a*).

(*a*) See Gargrave v. Smith, 1. Salk. 92.; and Martin v. Leſterton, 2. Black. 841.; Lambert v. Stother, Bull. N. P. Rep. 1089.

Caſe 164.

Clement *againſt* Scudamore.

Hilary Term, 13. *Will.* 3. *Roll* 278.

If a perſon have five ſons, and the youngeſt ſon die in the life-time of his father, leaving iſſue *a daughter*, and the father afterwards purchaſe and become ſeiſed of *copyhold lands* in the nature of *Borough Engliſh*, the daughter of the fifth ſon ſhall, on the death of her grandfather, inherit theſe lands *jure repreſentationis*, and not the fourth ſurviving ſon; for the youngeſt ſon by *Borough Engliſh*, and his *repreſentatives*, are as much *heirs* to the *Borough Engliſh* lands as an eldeſt ſon or his repreſentatives are heirs to lands deſcendible at common law.

S. C. 1. Peer. Wms. 63. S. C. 1. Salk. 243.

SPECIAL VERDICT, finding that the lands in queſtion were *copyhold lands*, part of the manor of *Croydon*, in *Surrey*, of the nature of *Borough Engliſh*, and that the cuſtom of the manor was, that all copyhold tenements of that manor did and ought to deſcend to the youngeſt ſon and his heirs; that one *F. W.* had iſſue five ſons; that the youngeſt died, living the father, leaving iſſue a daughter; that after the youngeſt ſon's death, the father purchaſed the lands in queſtion, and was thereunto admitted, to have and to hold according to the cuſtom of the manor; that he after died ſeiſed; and that the fourth ſon entered, upon whom the daughter of the fifth ſon entered and made leaſe to the plaintiff.

So the queſtion was, Whether the daughter of the youngeſt ſon, dying in the life of the father, has good title as *repreſentative* of her father, who, if he had lived, would have inherited as heir to his father?

HOLT, *Chief Juſtice*, delivered the opinion of THE COURT.

We are all of opinion that the daughter has good title.

FIRST, It is to be conſidered, that where this cuſtom of *Borough Engliſh* is for the youngeſt ſon to inherit, by this cuſtom the youngeſt ſon is put into the room and ſtead of the eldeſt ſon at common law; for as an inheritance by common law ſhall go to the eldeſt ſon, ſo by this cuſtom it ſhall go to the youngeſt, without any difference. Therefore ſince this cuſtom alters the deſcent from *the eldeſt* to *the youngeſt* ſon, there is the ſame reaſon that the *repreſentative* of the youngeſt ſhall take, as there is at common law for the repreſentative of the eldeſt. And there ought not to be any difficulty herein, for it appears (though *Coke* (*a*) be of a contrary opinion), that all the lands in *England* before THE CONQUEST, and for ſome time after, were generally *gavelkind* (*b*); and that ſoon after THE CONQUEST, for the better ſtrength and ſupport of THE CROWN, *knight ſervice* tenure was introduced, and the

S. C. Holt, 124. S. C. 2. Ld. Ray. 1024. Noy, 106. 1. Mod. 96. 102. 2. Sid. 61. Mar. 94. 45. Godb. 166. Dyer, 196. 4. Leon. 242. Co. Lit. 110. b. 140. Cro. Jac. 198. Cro. Car. 411. Jones, 362. Somer. on Gav. 7. 3. Peer. Wms. 62. 1. Wilſ. 64. 2. Com. Dig. "Burrough" "Engliſh" (A.). 1. Bac. Abr. 329. 458. 2. Bac. Abr. 33.

(*a*) Co. Lit. 110.

(*b*) Vide Lambard's Saxon Law, 167. Selden's Notes in Eadmerum, 184. Wright's Tenures, 31. 175. Robinſon on Gavelkind, Append. 10. Mod. 417. 12. Mod. 623. Caſes T. T. 276. 1. Peer. Wms. 64. 475. 3. Peer. Wms. 63.

courſe

courſe of deſcent altered, and the whole was made deſcendible to the eldeſt ſon, to the intent that theſe tenants in *knight ſervice*, * who by their tenure were to wait on the king in his wars, might do it with more dignity and grandeur (*a*). So in this inſtance the ancient *Saxon law* was then altered; but notwithſtanding that hereby the eldeſt male was preferred before the youngeſt, and the male always before the female, yet the *right of repreſentation* remained even to this day. CLEMENT *againſt* SCUDAMORE.

SECONDLY, This *right of repreſentation* has been conſidered in all countries and nations. By the ancient *law of Iſrael*, in the *Book of Numbers* (*b*), an account is given of this matter of repreſentation. It was a law that the male ſhould inherit all, but upon failure of them the female; and it was a law, as ſome ſay, brought out of *Egypt*, but always practiſed, that the eldeſt ſon ſhould have a double ſhare; but this was not only *quatenus* he was eldeſt, but as he was repreſentative too. It appears by *Selden* (*c*), that the daughter ſhould in that caſe have a double portion; ſo that repreſentation was always practiſed by the *Greeks* and the *Romans*, even by the Law of the Twelve Tables (*d*).

But in THE THIRD PLACE, this *right of repreſentation* has not only room in inheritances deſcendible according to the courſe of the common law, but holds alſo in inheritances deſcendible according to cuſtom; for in caſe of *gavelkind*, which now we know to be the *cuſtom of Kent*, if a man have three ſons, and purchaſe land in *gavelkind*, and the youngeſt ſon, in the life of the father, die, leaving iſſue *a daughter*, no doubt *the daughter* ſhall inherit; but if the purchaſe had been to the father, and heirs males of his body, the daughter had been excluded *per formam doni*; but the cuſtom making it deſcendible to the heir male makes room for the repreſentative of him; and there is no difference between *gavelkind* and *borough-Engliſh*, but *ſecundum majus et minus*; in *gavelkind* all the ſons take all; in *borough-Engliſh* the youngeſt takes all; and the law takes notice of both theſe cuſtoms; for which he quoted the caſe of *Fane v. Barr* (*e*), where the cuſtom was for a copyhold to deſcend to the youngeſt ſon, and not to the eldeſt brother; and a copyholder ſurrendered the land to another and his heirs, but before admittance the ſurrenderee died, leaving two ſons; and the queſtion was between the two ſons; and it was adjudged, that the eldeſt ſon ſhould be admitted, becauſe the cuſtom was, that the eſtate ſhould deſcend to the youngeſt brother, and there was no eſtate in the anceſtor to deſcend; and therefore the eldeſt ſon muſt have taken as purchaſer. But according to the report I have of the caſe, the Court ſaid, that if the cuſtom had been laid to have been *borough-Engliſh* the eldeſt had been excluded, for the law takes notice of *borough-Engliſh* and *gavelkind cuſtoms*. In this caſe, the cuſtom Noy, 15. Dyer, 5. b. 1. And. 191. 2. Lev. 87. Vide ſtat. 31. *Hen.* 8. c. 3. 18. *Edw.* 6. c. 1. NOTA.

(*a*) See the *fifth edition* of Sir Matthew Hale's Hiſtory of the Common Law, by Mr. Serjeant Runnington, ch. 12, page 230, 231; &c.

(*b*) Bk. Numbers, chap. xxvi. xxvii.

(*c*) Selden de Succeſſionibus, ch. 23.

(*d*) Taylor's Elements of Civil Law, 539.

(*e*) In the common pleas, in Hilary Term, 1699. Roll 773.

CLEMENT *againſt* SCUDAMORE.

as found is ſo far from excluding the daughter, that it expreſsly comprehends her; for the cuſtom is, that the land is of the nature of *borough-Engliſh*, and did and ought to deſcend to the youngeſt ſon and his heirs. So that it is not only that it ought to deſcend to the youngeſt ſon, but alſo to him and his heirs: though it had
* [122] been* the ſame thing to me; for if the father be diſſeiſed, or make a feoffment during infancy, this right of entry ſhall deſcend to the youngeſt ſon, and if he die before entry, it ſhall deſcend to his daughter, though the father died not ſeiſed of the land (*a*). If there be deſcent of land in *borough-Engliſh* on an heir under age, and a real action is brought, he ſhall have *his age*, or the *parol ſhall demur*, as it would in caſes of inheritance at common law. And what reaſon can there be why it ſhould have thoſe qualities, and not the other qualities as repreſentative right? And he approved of the opinions of BERKLEY and BRAMPSTONE, *Juſtices*, in the caſe of *Reeves v. Malſter* (*b*); for he ſaid, if the other opinion had prevailed it would beget abundance of confuſion, but following the other would ſettle things upon a laſting foundation.

And judgment was given for the daughter (*c*).

(*a*) 8. Co. 43. Jones, 361.

(*b*) Cro. Car. 510.

(*c*) But a cuſtom within a manor that lands ſhall deſcend to the *eldeſt ſiſter*, where there is neither a ſon nor a daughter, does not extend to an *eldeſt niece*, but the lands muſt deſcend according to the rules of the common law, in default of ſuch ſon, daughter, and niece. Den, on demiſe of Goodwin, *v.* Spray, 1. Term Rep. 466.

Caſe 165. Grovenor *againſt* Soame.

One joint and ſeveral bail-bond for the appearance of *three* defendants is bad.

S.C. 3. Salk. 57. S. C. Holt, 89. Cro. Jac. 286. 1. Salk. 97. 99.

ONE joint *bill of Middleſex* againſt three, with an *ac etiam ſuper ſcriptum obligatorium* by them jointly and ſeverally. The ſheriff took one bail-bond for the appearance of the three; and there being no appearance, the plaintiff took an aſſignment of the bond, and now would have the ſheriff amerced.

FIRST, It was agreed, that the bail-bond was not according to the ſtatute 23. *Hen.* 6. c. 9. being for a joint appearance to ſeveral actions.

An action will not lie againſt a ſheriff for taking *inſufficient bail*; but if he have not the defendant on the return he may be *amerced*, unleſs he has aſſigned the bail-bond.

HOLT, *Chief Juſtice*, ſaid, that it had been adjudged in CHIEF JUSTICE GLYN's time, that if the ſheriff take *inſufficient bail*, and has not the party at the return of the writ, an action would lie againſt him; but that the contrary has been held ſince in the common pleas. It was indeed always agreed, that an action would not lie for taking *inſufficient bail* (*a*); but it was not ſettled, whether it

Ante, 47.—Cro. Eliz. 808. 852. 862. Noy, 39. 1. Sid. 96. 2. Saund. 59. 154. 1. Mod. 33. 240. 1. Salk. 97. 99. Tidd's Pract. 105. Sellon's Pract. 143. 1. Bac. Abr. 206.

(*a*) But ſee Ethericke *v.* Cooper, 1. Ld. Ray. 425.

would

would not lie for taking inſufficient bail, and not having the party at the return of the writ; for though the ſtatute commands him to take reaſonable bail, yet if he has not the party he ſhall be amerced; and the ſtatute 23. *Hen.* 6. c. 9. does not exempt him from that. GROVENOR *againſt* SOAME.

The writ was, *in placito tranſgreſſionis ac etiam billæ*, and the bail-bond was to appear *in placito tranſgreſſionis* only, and held good in HALE's time. Variance between *bail-bond* and *writ*.

And though ALL THE CLERKS ſaid, that they knew the ſheriff amerced after an aſſignment of the bail-bond, yet HOLT, *Chief Juſtice*, ſaid, that he had known it denied. Cro. Jac. 286. 2. Lev. 123. 2. Show. 51. 10. Mod. 327. 5. Com. Dig. "Pleader" (2. W. 25.). 1. Bac. Abr. 207.

By THE OTHER JUSTICES. If one accept of an aſſignment (*a*), and the ſame bail are given as bail to the action that were bail to the ſheriff, he cannot deny them (*b*). If bail to *the ſheriff* become *bail above*, they are not liable to *exceptions* after aſſignment of bail-bond.

But by HOLT, *Chief Juſtice*, If the ſame that were bail become bail to the action, and he except againſt them, and they do not juſtify, he may go on with amerciaments againſt the ſheriff. 1. Salk. 97. 7. Mod. 62. 117. Tidd's Practice, 135. 1. Com. Dig "Bail" (K. 5.).

(*a*) See 4. & 5. *Ann.* c. 16. (*b*) See Boldero *v.* Gray, Cowp. 769.

Anonymous. Caſe 166.

BY ALL THE CLERKS. If *a releaſe* be pleaded, and the plaintiff crave *oyer* of it, and the defendant will not grant it, the plaintiff may ſign judgment for want of a plea. Judgment may be ſigned after releaſe pleaded and *oyer* denied.

Ante, 27, 28. Dyer, 227 Carth. 417. 453. Ld. Ray. 347. 892. 970. 1056. 1176. Salk. 497. 3 Lev. 50. Stra. 227. 1186. 1198. 1241. 1. Bac. Abr. 14.

* Sir Samuel Aſtry's Caſe. Caſe 167.

SIR SAMUEL ASTRY being maſter of THE CROWN OFFICE, and having been abſent from the exerciſe of his office a conſiderable time, being *fractus ſenio*, a *ſcire facias* was brought againſt him, and iſſue joined. The maſter of the crown-office, upon a *ſcire facias* againſt him and iſſue, is entitled to a *trial at bar*.

He now moved for a trial at bar.

THE ATTORNEY GENERAL oppoſed it as a matter of *prerogative*, that THE QUEEN might try her cauſes *at niſi prius* or *at bar*, as ſhe pleaſed. S. C. Salk. 651. 2. Inſt. 424. 1. Cro. 248. 2. Salk. 625. 651. 2. Keb. 133. 164. 2. Inſt. 421. to 426. Ld. Ray. 1556. 8. Mod. 316. Stra. 822. 1049.

CURIA. It is the common right of any gentleman at the bar to have a trial at bar, and it never has been denied in the caſe of an officer of the court. And though MR. ATTORNEY may have any of the queen's cauſes tried at bar, and is not bound to conſent to *a niſi prius*, yet we are not ſatisfied that he ought to have *a niſi prius* Fitzg. 40.

Sir Samuel Astry's Case.

where trial at bar is reaſonable, without conſent; for the ſtatute of *Weſtminſter the Second, cap.* 30. which was the firſt ſtatute of *niſi prius*, ſays, "that if matter require great examination it ought to "be at bar."[a]

Et adjournatur: and nothing ever was done in it.

Caſe 168. Cuddon, Chamberlain of London, *againſt* Provoſt.

A bye-law creating a penalty for not weighing goods ſold by foreigners at THE ANCIENT BEAM of the city of *London* is good. Poſt. 177.

1. Roll. Abr. 557. Cowp. 270. 1. Bac. Abr. 682.

A RETURN was, upon a *habeas corpus* (*a*), that *London* is an ancient city, &c.; that time out of mind there was AN ANCIENT BEAM kept at the charge of the city for the weighing of all ſuch goods as were uſually bought or ſold by weight in *London*, at which all foreigners ought, and time, &c. uſed to weigh all ſuch goods, &c. and then ſets forth their cuſtom of making bye-laws for explanation of their cuſtom, and that by a bye-law made at ſuch a time, the ſame as in the *caſe of Barnardiſton* (*b*), VIZ. that every foreigner who ſhould ſell goods uſually ſold by weight without having firſt weighed them at THE COMMON BEAM, ſhould pay thirteen ſhillings and fourpence for every ——— weight; that defendant being foreigner, &c.

And all the exceptions taken in that caſe were inſiſted on here.

And yet THE COURT, after great conſideration, awarded a *procedendo*, according to the ſaid caſe.

(*a*) But it is ſettled, in the caſe of *Ballard v. Bennett*, that, except in *London*, the court of King's bench will not enter into the validity of a bye-law upon the return to a *habeas corpus*. 2. Burr. 777.

(*b*) 1. Lev. 14.—The exceptions in *Barnardiſton's Caſe* were, 1ſt, That the bye-law for bringing all goods uſually ſold by weight to the city-beam was unreaſonable. 2dly, That the bye-law was unreaſonable in reſpect of the penalty and the inequality thereof. 3dly, That this bye-law takes from the ſubjects divers privileges that the law allows, as eſſoins, &c. 4thly, That the bye-law reſtrains the action to their own courts. 5thly, That it does not appear he had notice of the bye-law.

Caſe 169. Cudden *againſt* Eſtwick.

A bye-law of the city of *London* inflicting a penalty on any perſon who ſhould employ a *porter* not a freeman of THE PORTERS COMPANY is void; but a bye-law that none but a *freeman* ſhall do porterage-work is good.—S. C. 1. Salk. 143. 192. S. C. Holt, 433. 8. Mod. 211. 267. 10. Mod. 131. 338. 12. Mod. 269. 686. Gilb. Eq. Rep. 43. Fitzg. 309. 313. 1. Peer. Wms. 283. 2. Peer. Wms. 207. Comy. Rep. 269. Stra. 462. 675. 1085. Viner's Abr. "Bye-Law" (A. 2.). pl. 28. 1. Bac. Abr. 339. 341. 2. Burr. 846. 3. Burr. 1847. Cowp. 270.

UPON a *habeas corpus* from *London* the return ſet forth the cuſtom of *London*, that time out of mind there was an ancient COMPANY OF FREE PORTERS in *London*, and a cuſtom to make bye-laws for the better governing of the ſaid Company; and in purſuance thereof, an act of common council inflicting ſuch a penalty on any that ſhould employ any not free of the ſaid Company in porterage work; and that the defendant did, &c.

So the doubt was, Whether ſuch a bye-law, inflicting a penalty upon ſtrangers for employing one not free, were good?

For

CUDDEN against ESTWICK.

FOR IT WAS AGREED, that a bye-law that none but a free porter ſhould do the work would be good, with a penalty. And in reference to bye-laws in general, a difference was taken between a private corporation or company and a great city * or borough; for the former can only make bye-laws to bind their own members, and touching matters that concern the regulation of the trade or other affairs of the Company; but great cities and towns, as *London*, *Briſtol*, *York*, &c. can make bye-laws for the better ordering and managing ſuch town, and that law will bind ſtrangers to the freedom of the town, while within ſuch towns, and they are bound to take notice of ſuch laws at their peril (*a*).

* [124]

And this diverſity was agreed to by THE COURT.

HOLT, *Chief Juſtice*. It is true, every foreigner that comes to a place is bound to take notice of the law of the place (*a*); but here lies the hardſhip, that you lay a penalty upon a man if he do not take notice whether a porter is free or not free, and there is no way for him to know it.

And at laſt IT WAS ADJUDGED, that no *procedendo* ſhould go, and that the bye-law was void to bind a ſtranger, who could not have an action againſt them for not keeping a ſufficient number of porters, nor againſt the porters for not ſerving him. And an act of common council inflicting a penalty for buying from any but a freeman would be void.

CUSTOMS againſt *reaſon* are void.

Moor, 588.
Bridg. 11.
Fitzg. 51.
Ld. Ray. 57. 499. 869. 1135.
Salk. 203.
1. Bac. Abr. 672. 676.
1. Bl. Com. 77.

NOTE, In the argument of this caſe it was ſaid, that cuſtom againſt reaſon is void, becauſe it deprives the ſubject of the common law, which is his birthright. And the reaſons by which a cuſtom is ſupported are generally theſe:

FIRST, Becauſe the party bound by it has ſome benefit by it.

SECONDLY, That the party who claims the advantage of it is at ſome charge by reaſon of it.

THIRDLY, That it may have a reaſonable commencement, or ſuppreſs fraud.

And the two firſt of theſe reaſons hold in the caſe of *toll-traverſe* and *toll-through* (*b*).

(*a*) A bye-law by the mayor and common council of *Exeter* that no butcher or other perſon ſhould, within the walls of the ſaid city, ſlaughter any beaſt, under pain of forfeiting certain penalties therein ſpecified, is good, being not in *reſtraint* of trade, but only *a regulation* of it; and other inhabitants are bound by it as well as the members of the corporation, Pierce v. Bartrum, Cowp. 170.—And if a power be granted by charter to a company exerciſing a particular trade in a particular place to make bye-laws for the government of all perſons exerciſing that trade in that place, the company is enabled to make bye-laws, binding as well on perſons exerciſing that trade who *are not members of the company* as thoſe who are. The Butchers Company v. Morey, 1. H. Bl. Rep. 370.

(*b*) See Year-Book 5. *Hen.* 6. pl. 26.; Prideaux v. Warren, 1. Mod. 105.; Harprut v. Wills, 1. Mod. 48.; James v. Johnſton, 1. Mod. 231. S. C. 2. Mod. 143. Coulton v. Smith, Cowp. 47.; Lord Pelham v. Pickerſgill, 1. Term Rep. 660.

Caſe 170.

The Queen *againſt* Langley.

It is not an indictable offence to ſpeak *unmannerly words* of the mayor of a corporation, or the juſtice of a county; but the offender may be bound to *good behaviour*.

LANGLEY was indicted for theſe words ſpoke to the *Mayor of Saliſbury*: "You, MR. MAYOR, I do not care a fart for you; "you, MR. MAYOR, are a rogue and a raſcal."

It was urged, that the indictment lies; that the words tended to the diſparagement of the government, whoſe officer this perſon was.

But to the contrary it was ſaid,

FIRST, That it was not laid that he was then in the duty of his office, or that he was a juſtice of peace.

* [125]

SECONDLY, As to the diſparagement upon the government, a diverſity was taken between elective officers, and ſuch as are nominated by the queen; for the corruption of the firſt cannot reflect upon the government.

S.C. 1. Salk. 190.
S.C 2. Salk. 697.
S. C. 2. Ld. Ray. 1029.
S. C. Holt, 654.
2. Salk. 425. 698.
2. Lev. 200.
1. Vent. 16 327.
2. Jo. 229.
Fareſl. 28.
1. Mod. 35.
2. Keb. 594.
3. Mod. 139.
1. Sid. 65. 144.
Ld. Ray. 153.
11. Mod. 166.
10. Mod. 186.
12. Mod. 98. 414. 514.
Stra. 400. 1157.
1. Hawk. P. C. ch 21. ſ. 13.
4. Com. Dig. "Indictment" (E).
3. Sid. 65.
Cro. Jac. 58.
Hob. 62.

* THE COURT. He might have forced him to find ſureties for his good behaviour, or committed him (*a*).

THEY ALSO AGREED, that whatever is a breach of the peace is indictable; as ſending *a challenge*; but that theſe words were not a breach of the peace, but only occaſional, and tending towards it.

And after great deliberation THEY ADJUDGED the words were not indictable: for it is not as much as ſaid, that he was in the execution of his office, or a juſtice of peace. Indeed if they were put in writing, they would be *a libel* puniſhable either by indictment or action; but they are but looſe unmannerly words, like thoſe ſpoke of an *Alderman of Hull*, "When he puts on his gown, SATAN "enters into it," which were adjudged not indictable in *Kelynge*'s time (*b*). "You are a forſworn mayor, and have broke your "oath," not indictable (*c*). And binding him to his good behaviour is ſufficient to ſecure the authority of mayors; but that muſt be done inſtantly, according to *Doctor Bonham's Caſe* (*c*).

HOLT, *Chief Juſtice*, ſaid, that words that directly tend to breach of peace may be indictable; but otherwiſe, to encourage indictments for words would make them as uncertain as actions for words are.

(*a*) See the caſe of Rex *v.* Darby, 3. Mod. 139.; Simmons *v.* Sweete, Cro. Eliz. 78.; Dean's Caſe, Cro. Eliz. 629.
(*b*) 1. Mod. 35.
(*c*) Stiles, 251.
(*d*) 8. Co. 116. 118.

Berwick

Berwick *againſt* Andrews.

Caſe 171.

Eaſter Term, 2. Anne, Roll 64.

ERROR OF A JUDGMENT upon *nil dicit* in the common pleas. The caſe was, An executor brought an action upon a judgment obtained by the teſtator, ſuggeſting a *devaſtavit* in the life-time of the teſtator.

If a plaintiff recover againſt an adminiſtrator, and die, his executor may maintain debt on the judgment upon a ſuggeſtion of a *devaſtavit* by the defendant in the life-time of the teſtator.

And it was objected, that this carried it a ſtep farther than the caſe of *Wheatley v. Lane (a)*; for there the action was brought by the party to the judgment, and to whom *the wrong* was done: whereas this is, FIRST, by one that is no party to the judgment; for if he would ſue execution upon this judgment, he muſt have firſt made himſelf party by a judgment on a *ſcire facias*, AND NEXT by one to whom the *tort* was not done; and this is a perſonal *tort* that ought to die *cum perſonâ*, and that this matter ought not to go a ſtep farther. Such action will not lie upon a bond ſuggeſting a *devaſtavit (b)*; and it being for a wrong done to the teſtator, an action ought not to lie for it for the executor no more than it would lie againſt an executor of an executor *de ſon tort* till the ſtatute of 30. *Car.* 2. c. 7.

S. C. 1. Salk. 314. S. C. Holt, 314. S. C. 2. Ld. Ray. 971. 1502. 1. Sid. 397. 1. Lev. 231. 255. 2. Lev. 110. 10. Mod. 95. 12. Mod. 71. Fitzg. 265. Ld. Ray. 36. 1. Peer. Wms. 687. Cowp. 375. 4. Term Rep. 280.

MOUNTAGUE, *contra*, relied upon the reaſon of the caſe of *Wheatley v. Lane*, and that of *Cluther v. Thin (c)*.

HOLT, *Chief Juſtice*. The defendant is the party againſt whom the recovery is, and judgment is *de bonis teſtatoris* againſt him; and it is ſuggeſted, that he has *waſted*: this is what the plaintiff's teſtator might have done. Sure if an eſcape were in the life-time of * the teſtator, the executor may have debt againſt the jailor for it; but ſuch action would not lie againſt an executor, nor would this action lie againſt the defendant's executor here, as was adjudged in this court in HALE's time, becauſe it is a *perſonal tort*, which dies with the perſon. And it was compared to the caſe of an eſcape by the ſheriff, for which debt does not lie againſt his executor, though it does againſt himſelf. But in caſe of eſcape the action always lies for the executor, even where it is in his teſtator's time; and ſhall not the executor of a parſon have debt againſt a pariſhioner for not ſetting out tithe (*d*). The cauſe why he ſhall have debt is, becauſe it is an injury done to his right, and therefore within the equity of the ſtatute *De bonis aſportatis*; and a *quare impedit* lies for an executor upon that ſtatute, in caſe he bring it within ſix months after the avoidance; and upon this judgment he might have ſued a *ſcire facias*, and after judgment therein have a *fieri facias* ſuggeſting a *devaſtavit*. Now this action is in lieu of a *ſcire facias*.

* [126]

Lutw. 66. 412. N. Lutw. 26. 124. 181. 208. 2. Lev. 110. 1. Vent. 30. Lutw. 670. 1. Salk. 310. 314.

POWELL, *Juſtice*. HALE uſed to ſay, that this action ought not to be ſuffered but when there was a judgment to ſupport it; and this

(*a*) 1. Saund. 219.
(*b*) 1. Vent. 313. 2. Lev. 145. 209. 3. Keb. 735. 797.
(*c*) 2. Sid. 102. N. Lut. 208. 210.
(*d*) 1. Sid. 407.

BERWICK *against* ANDREWS.

is within the equity of the ſtatute *de bonis aſportatis*, 4. *Edw.* 3. c. 7.

GOULD and POWYS, *Juſtices*, accordingly. The difference is, where it is a *tort* annexed to goods then it is within the ſtatute, becauſe it ariſes *ex delicto*, mixed with a right (*a*).

And POWELL, *Juſtice*, ſaid, that the better opinion was, that an action on the caſe would not lie for an executor for the *falſe return* of a proceſs of execution.

HOLT, *Chief Juſtice*. I have known the contrary adjudged.

A declaration, in debt by an executor on a judgment obtained by his teſtator againſt an adminiſtrator, ſuggeſting a *devaſtavit* is good, although it do not aver that *the debt was not ſatisfied*.

But then AN EXCEPTION was taken to *the declaration*, that it was not alledged that the debt was not ſatisfied, but only that the teſtator nor plaintiff could not have execution of the judgment; but it may be they were ſatisfied without execution.

HOLT, *Chief Juſtice*. The foundation of this action ſtands upon two things, *viz.* the debt not being ſatisfied, and *the waſte*; and in all actions of debt it is incumbent upon the plaintiff to ſhew that the debt is due.

Dougl. 5. 732.

POWELL, *Juſtice*. If the plaintiff had been paid the waſting, the *aſſets* could be no *devaſtavit* as to him: and if iſſue were taken upon *devaſtavit* or not, the defendant might give payment to the plaintiff in evidence.

* [127]

* *Quod* HOLT, *Chief Juſtice*, *negavit*; becauſe the waſting the *aſſets*, the debt being not ſatisfied, is the cauſe of action; and if the debt be paid, the iſſue ought to come upon that, that is a *nihil debet*, which may well be pleaded, though this be a debt upon a judgment, becauſe this is matter of fact; and if you traverſe the *devaſtavit*, you admit the non-payment: and he compared it to the caſe of debt againſt a ſheriff for an eſcape, in which you muſt ſhew the debt not to be ſatisfied. Suppoſe a defendant in execution pays the plaintiff, and no ſatisfaction is entered on record, and the ſheriff ſuffers him to eſcape, and debt is brought againſt him for it, he cannot take advantage of that payment.

1. Saund. 38. 219.

And at laſt, the record of the caſe of *Wheatley v. Lane* (*b*) was brought into court, agreeing exactly with this declaration.

And the plaintiff had judgment.

(*a*) Where the cauſe of action is money due, or a contract to be performed, or gain or acquiſition by the labour or property of another, or a promiſe by the teſtator or inteſtate expreſſed or implied, the action ſurvives againſt his perſonal repreſentative; but if it be *a tort*, or ariſe *ex delicto* ſuppoſed to be by force againſt the peace, or where the plea to the action muſt be that the teſtator or inteſtate was *not guilty*, the right of action dies with the perſon. Hambly *v.* Trott, Cowp. 371. 375.

(*b*) 1. Saund. 216. S. C. 1. Lev. 231. 255. S. C. 1. Sid. 397. S. C. 2. Keb. 431. 443. 455.

Ruſſell *againſt* Corn.

Caſe 172.

An action of *falſe impriſonment* of the *wife*, brought by *huſband* and *wife*, declaring *per quod* the huſband's domeſtic concerns remained undone, *ad damnum* of both, is good, and the *per quod* only for aggravation.

S. C. 1. Salk. 119.
S. C. Holt, 699.
S. C. 2. Ld. Ray. 1031.
Poſt. 149.
Cro Jac. 123.
1. Keb. 787.
1. Salk. 119.
2. Salk. 642.
1. Show. 180.
Andr. 245.
3. Bac. Abr. 306, 307.
4. Term Rep. 616.
1. H. Bl. Rep. 108.

FALSE IMPRISONMENT by huſband and wife, for the impriſonment of wife, *per quod negotia domeſtica* of the huſband *per ſpatium —— remanſerunt infecta*; *ad grave damnum* of both.

IT WAS MOVED *in arreſt of judgment*, that the buſineſs of the huſband remaining undone could not be to the damage of the wife; and that the action for that ought to be by the huſband alone; as if the huſband conclude *per quod ſolamen et conſortium amiſit*, he muſt conclude *ad damnum* of him alone.

But it was anſwered, that here the action being well brought and conceived for the impriſonment, what came under the *per quod* would only be taken for aggravation; as if words, in themſelves actionable, be ſpoke of a wife, and the huſband and wife bring the action, and conclude *per quod* the huſband loſt his cuſtomers, it will be well (*a*); for the words being in themſelves actionable, the *per quod* ſhall be taken for aggravation.

Quæ omnia Cur. conceſſit.

And by HOLT, *Chief Juſtice*, matter may be laid by way of *aggravation* in treſpaſs for breaking his houſe and beating his ſervant, without ſaying *per quod ſervitium amiſit* (*b*). No action lies for the maſter for battery of his ſervant without a *per quod*, yet it may be well put in as an aggravation; but if you make two ſeveral counts of it, one of them, *viz.* for beating ſervant, will be bad. Suppoſe a man get another's maid or daughter with child, no treſpaſs lies for it; but if he that has done it came into the houſe without the owner's leave, he may put the getting his daughter with child in for aggravation, or he may omit it, and give it in evidence within the *alia enormia*.

Judgment was given for the plaintiff, *niſi cauſa*, the firſt day of next Term (*c*).

(*a*) See Coleman and his Wife *v.* Harcourt, 1. Lev. 140. and Grove and his Wife *v.* Hart, Bull. N. P. 7.

(*b*) See Chamberlain *v.* Greenfield, 3. Wil. 293.

(*c*) See Newman *v.* Smith, in the king's bench, in Eaſter Term, 5. *Anne*, 2. Salk. 642. S. C. Holt, 699. NOTE *to former edition.*—See alſo Milner *v.* Milnes, 3. Term Rep. 627.

EASTER TERM,

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

* The Queen *againſt* Lane.

Caſe 173.

INDICTMENT was for exerciſing the trade of *a barber* without ſervice of ſeven years.

An indictment on 5. *Eliz.* c. 4. muſt be laid *contra pacem.*

The exception was, that it was not laid *contra pacem.*

S.C. 3. Salk. 190. 1. Salk. 67. Poſt. 220. Cro. Jac. 527. Cro. Car. 584. 2. Salk. 613. 4. Com. Dig.

And though HOLT, *Chief Juſtice*, thought it well enough, becauſe laid *contra formam ſtatuti*, yet by THE OTHER THREE it was quaſhed, for every breach of a law is againſt the peace, and ought to be ſo laid.

4 Mod. 145. 164. 5. Mod. 425. 2. Hale, 188. 2. Hawk. P. C. ch. 25. ſ. 92. "Indictment" (G. 6.). Fitz. 63. Strange, 834.

Smith *againſt* Aiery.

Caſe 174.

IN an action on the caſe for money won at play, there were two counts, one ſetting forth *a ſpecial agreement* to play at ſuch a game, and mutual promiſes of payment, as it ought to be; the other was, that in conſideration that the plaintiff ſuch a ſum had won of the defendant at play, he promiſed to pay it.

An *indebitatus aſſumpſit* will not lie to recover money won at play.

S. C. 3. Salk. 14. 175. S. C. Holt. 329. S. C. 2. Ld. Ray. 1034. Poſt. 131. 344. 5. Mod. 13. 1. Lutw. 180. 1. Vent. 53. 152. Hard. 486. 1. Lev. 298. 1. Salk. 22. 3. Lev. 118. Ld. Ray. 68. Dougl. 18. 2. Bac. Abr. 15.

And

Sutton *against* Aubay.

And here IT WAS RESOLVED, on a motion in arreſt of judgment after a verdict for the plaintiff and *entire damages* given,

FIRST, That an *indebitatus aſſumpſit* did not lie for money won at play; for that action never would lie but where *debt* would lie (*a*), and it never was heard that debt was brought for money won at play.

* [129]

If a declaration contain two counts; the firſt on *mutual promiſes* for money won at play; the ſecond on an *indebitatus aſſumpſit* to pay "the ſaid ſum "won at the "play aforeſaid;" the latter count is bad. Dougl. 377. 651. 730.

SECONDLY, That the ſecond count was bad, for at that rate one may declare, that defendant was indebted to him, upon a certain agreement, in ſuch a ſum of money, and that in conſideration thereof he promiſed to pay, which would doubtleſs be bad; for he ſhould ſpecially ſet out ſome agreement whereby a debt was raiſed, as for * goods ſold and delivered, &c. An *indebitatus* can never be upon *mutual promiſes*; but *general aſſumpſits* lie on mutual promiſes (*b*).

HOLT, *Chief Juſtice*, quoted a caſe in my LORD HALE's time, where it was held, that it would not lie upon *a bill of exchange* againſt the acceptor (*c*). And he ſaid, that there was no way in the world to recover money won at play but by *ſpecial aſſumpſit*.

PER CURIAM. Notwithſtanding the caſe of *Eccleſton v. Linne* (*d*) in the exchequer chamber, it has been held frequently, both here and in common pleas, ever ſince, that this action of *indebitatus* would not lie for money won at play (*e*).

If ſome of the counts in a declaration are bad, and entire damages given, the error is not cured by the verdict. Dougl. 377. 730.

THIRDLY, They held clearly, that any thing in the firſt count which was right, could not help any defect in the ſecond; for though they both were put in one declaration, yet they were as diſtinct as if they had been in two ſeveral actions.

A verdict cures the defect of a *ſpecial agreement* not being alledged. 8. Mod. 240. 10. Mod. 229. 300. 12. Mod. 308. 421. 510. Comy. 12. Stra. 973. 1011.

FOURTHLY, Though it was objected, that this was *after verdict*, whereby the jury had found that plaintiff had won money of defendant, which could not have been without *a ſpecial agreement* and *mutual promiſes* between them; and if what the jury muſt neceſſarily have found had been alledged, it would have been well, and therefore the verdict cured (*f*);

Yet THE WHOLE COURT ordered judgment to be ſtayed till the plaintiff moved further.

And PARKER moved for judgment at another day, alledging, that *mutual hazard* ſufficed to raiſe *a debt*; and for caſes cured

(*a*) By LORD MANSFIELD, There is no foundation for the notion that no *aſſumpſit* will lie where an action of debt may not be brought. 3 Burr. 1008.

(*b*) Carth. 479. Skin. 196. 218.

(*c*) Hard. 485. 1. Vent. 152. 1. Bac. Abr. 164.

(*d*)

(*e*) See Browning v. Morris, Cowp. 790.

(*f*) A verdict will not aid where the *gift* of the action is not laid in the declaration, but it will cure ambiguity, Avery v. Hoole, Cowp. 826. and therefore, after verdict, nothing is to be preſumed, but what is either expreſsly ſtated in the declaration, or neceſſarily implied from thoſe facts which are ſtated, Spires v. Parker, Douglas, 682. *note*.

after

after verdict, quoted the cases of *Mannington v. Williams (a)*, and *Ashford v. Crispin (b)*.

SMITH *against*. AIREY.

HOLT, *Chief Justice*. The action ought to be brought upon *the agreement* of the parties. It is true, that when two agree to play for so much money, it is an actual promise; but if either win, there is no debt arises thereupon, for nothing but a meritorious valuable consideration can raise a debt, and it is an error to think that every contract which obliges one to pay money raises a debt *(c)*: as if *A.* promise *C.* to pay him a debt due to *C.* from *B.* and it be for good consideration, *A.* is thereby bound to pay it, but yet it is not a debt upon him. And if he after had come, and in consideration that I am bound to pay you the debt of *B.* I promise to pay you, an *indebitatus* would not lie thereupon. An *indebitatus* has been brought for a tenant-right fine *(d)*, which I never could digest.

How the account ought to have been.

1. Vent. 951. Hob. 18. 88. 7. Mod. 12. 11. Mod. 247. 10. Mod. 295. 12. Mod. 69. 258. 295. 344. Ld. Ray. 902.

GOULD, *Justice*, quoted the very case of *Sherebern v. Colebatch (e)*, and the case of *Mathwin v. Andrews (f)* in the court of common pleas.

PER TOTAM CURIAM, judgment was arrested.

(a) 1. Vent. 109.
(b) 1. Vent. 123.
(c) See *Moses v. Macfarlan*, 2. Burr. 1007. *Clerk v. Shee*, Cowp. 197. 794.
(d) 3. Lev. 261. See also *Grant v. Astle*, Dougl. 728. *note*; *Whitbread v. Hurst*, Dougl. 727. *note*.
(e) 2. Vent. 175.
(f)

* Anonymous.

Case 175.

IN EJECTMENT, the term was made for five years; and after verdict for the plaintiff, he was delayed of judgment and execution, by *injunction* in chancery, until the term incurred.

In ejectment, *the term* shall not be enlarged without consent, although the plaintiff was prevented by an injunction from proceeding.

And now it was moved to renew the term, and the case of *Dangdell v. Greenvill (a)* was quoted, where it was done, and that they used to do it frequently in THE EXCHEQUER.

CURIA. We cannot do it without altering the record.

Post. 222. 288. 309. 1. Salk. 322. Carth. 3. 204. 288. 391. 4to. Runn. Eject. 104. 12. Mod. 125. 398. 656. Ld. Ray. 561. 1411. Stra. 807. 1211. 1272. 3. Peer Wms. 36.

GOULD, *Justice*, said, that they had held in *Sir John Rell's Case (b)*, that it could be done by consent, but not otherwise *(c)*.

HOLT, *Chief Justice*, said, he considered there wanted a clock-house over-against the hall-gate.

And the motion was denied *(d)*.

(a) 1. Lev. 308.
(b) 1. Vent. 122. 2. Keb. 757.
(c) See 1. Salk. 257. and *Oats v. Shepherd*, 2. Stra. 1272.
(d) See Stra. 1211. 1272. 2. Ld. Ray. 896. 5. Mod. 33. 354. 1. Mod. 252. Barnes, 4to. 186. 4. Burr. 2449. *Lee v. Ellis*, 2. Bl. Rep. 941.

Parkins,

Caſe 176.

Parkins *againſt* Woollaſton.

If execution be ſued out before a *writ of error* is allowed or notice given, there ſhall be no *reſtitution.*

S. C. poſt. 139. S.C. 1. Salk. 321. Poſt. 139. 1. Vent. 30. *cont.* 1. Sid. 44, 45. 2. Stra. 867. 1186. 1. Wilſ. 16. 5. Com. Dig. "Pleader" (3. B. 12.). Comy. 321. 556. 564. Stra. 526. 632. 867. 1186. Ld. Ray. 47. 405.

CAPIAS on a judgment returnable ſuch a day, and *non eſt inventus* returned, but not filed. A writ of error was taken out before the day of return of the *capias* but not allowed till that very day, nor any notice thereof to the plaintiff's attorney.

THE COURT ſaid, that the opinion in ſome books was, that a *writ of error* was a *ſuperſedeas* to avoid execution from the enſealing thereof, though not to puniſh the officer until *ſuperſedeas* comes to him; and of this opinion is *Rolle*; but that the law now is taken, that it is not a *ſuperſedeas* until notice to the plaintiff's attorney, and that the allowance thereof is ſufficient notice, or that actual notice be before allowance (*a*).

A writ may be well executed on the day of its return, although it be after the riſing of the Court.

Cro. Eliz. 761.

AND THEY HELD, that if the *writ* be executed before notice of *writ of error*, the return or perfection thereof may be after; and if a *capias* be returnable ſuch a day, an execution of it *ſedente Curiâ* that day is good, *ſecus* not (*b*); ſo that they were all clear, that if a writ were returnable as of yeſterday, but not actually returned, and a writ of error is allowed or notified to-day, yet the return may be made and filed to-day.

Where writ of error is allowed the ſame day the execution is returnable, &c.

12. Mod. 501. 2. Term Rep. 279.

And if a writ of error be allowed or notified *ſedente Curiâ*, the day on which the writ of execution is returnable (becauſe it comes *ſedente Curiâ*, while the writ of execution is executable, and there cannot be well a fraction of a day), there it ought not to be returned or filed, but is *ſuperſeded*: but if it is not notified until after the Court is up, at which time the execution is executable, there a return may be of the writ, and that may be filed.

And according to that diverſity it was ordered to be filed here. PER CURIAM.

NOTE, It was upon a *ſcire facias* againſt bail, and no *capias* againſt principal pleaded.

(*a*) The *allowance* of a writ of error is of itſelf a *ſuperſedeas*, and the ſervice of it is only to bring the party into contempt, Jaques *v.* Nixon, 1. Term Rep. 279.; and where a *capias ad ſatisfaciendum* is returnable againſt the principal on a particular day, before which a writ of error is allowed and ſerved, that operates as a *ſuperſedeas* againſt the bail, although the *ca. ſa.* has been four days in the office before the allowance of the writ of error, Parry *v.* Campbell, 3. Term Rep. 390.

(*b*) But it ſeems to be now ſettled, that a writ may be well executed on the day of its return, although the execution was ſubſequent to the riſing of the Court, Maud *v.* Bernard, 2. Burr. Rep. 813. But in *ſcire facias* againſt bail, if they were ſummoned on the return day only an hour before *the Court riſes*, the Court will ſet aſide the proceedings, Webb *v.* Harvey, 2. Term Rep. 757.

Anonymous.

* Anonymous. Caſe 177.

BY HOLT, *Chief Juſtice*, and THE COURT. In an action by an aſſignee of bankrupt by commiſſioners on a ſimple contract, the right way is to lay the promiſe to have been to the bankrupt; except there be an expreſs promiſe after aſſignment made to the aſſignee.

A declaration in *aſſumpſit* by an *aſſignee* ought to ſtate the promiſe as made to *the bankrupt*, unleſs an *expreſs promiſe* is made to *the aſſignee*. 3. Salk. 59. Cowp. 570. 3. Term Rep. 433. 779. Cooke's B. L. 615.

And the way of declaring on a promiſe to the aſſignee is very inconvenient, and a means to ouſt the defendant of the benefit of the *ſtatute of Limitation*; for if the goods were ſold five years before the aſſignment by the bankrupt, and then the debt is aſſigned, and a year paſſes, and the aſſignee declares on a promiſe to himſelf, it will not be a good plea to ſay, that the defendant "*non aſſumpſit infra ſex annos* to the bankrupt," for that does not anſwer the declaration. And if he plead "*non aſſumpſit infra ſex* "*annos* to the plaintiff," it will be againſt him; for if there be any promiſe transferred by the act, it is only upon the aſſignment; and the intent of the ſtatute was only to transfer the action, and nothing elſe.

An aſſignee ought not to declare on a promiſe to *himſelf*. 2. Show. 238. 1. Keb. 1. 289. 1. Lev. 17. Fareſt. 83. 96. 3. Lev. 69. 191. Carth. 149. Skin. 21. 30. 149. 270. 293. 8. Mod. 171. 10. Mod. 244. 12. Mod. 324. Ld. Ray. 741. 1548. Stra. 697.

Indeed, if after aſſignment (*a*) another receive the money, action will lie for the aſſignee upon a promiſe to himſelf, becauſe the receipt of money after aſſignment is a contract with him, and every contract or agreement, *per* HOLT, *Chief Juſtice*, is an *expreſs promiſe*, not in word, but in deed, which is as ſtrong; and there is no ſuch thing as a *promiſe in law* (*b*), and that acceptance of a bill of exchange is an expreſs promiſe to pay it.

An aſſignee may declare in his own name for money had and received ſubſequent to the aſſignment. 2. Saund. 239. 1. Vent. 10. Ante, 29, 30. 81. 129. 3. Lev. 191. 1. Mod. 324. 2. Black. Rep. 830. Cooke's B. L. 617.

(*a*) 2. Saund. 239. 1. Vent. 10. Ld. Ray. 365. (*b*) See 1. Sid. 306. 1. Bac. Abr. 177. Comy. Rep. 205.

Mrs. Dennis *againſt* Doctor Lane. Caſe 178.

MRS. DENNIS was a widow, and had a daughter who was *an heireſs* to eight hundred pounds a-year, to whom *the Doctor* made love: the mother thereupon forbad him her houſe; yet he came at another day, and meeting the mother upon the ſtairs, notwithſtanding ſhe then again expreſsly forbad him to go forward, he puſhed on to the young woman's chamber in a rude manner.

If a gentleman viſit a young lady as her lover, and, on her parents denying him acceſs, he intrudes himſelf rudely into the houſe, follows the young lady on a journey taken to avoid him, aſſaults the perſon under whoſe protection ſhe is placed, and threatens to force her from him, it is a good cauſe to demand *ſurety for his good behaviour* from him. And although *the ſurety* muſt be demanded recently after *the cauſe* happen, and while *the fear* it occaſions exiſts, yet if the party, at any diſtance of time afterwards, do any act, though to another perſon, which ſhews that *the old grudge* remains, the Court will couple the laſt act with the antecedent cauſe of fear, and, on articles exhibited, grant *ſurety of the peace*. 1. Hawk. P. C. c. 60.

Mrs. Dennis against Dr. Lane.

manner. This behaviour frightened the daughter's mother ſo much, that ſhe ſent for friends to conduct her daughter to *London*; of which *the Doctor* having intelligence, came with three others, and followed the daughter, and came to the ſame inn where they lodged at night; and took up the adjoining rooms to the mother and daughter, whereby they put the mother into fits for fear; and the next morning, as they were taking coach, *the Doctor* aſſaulted *the gentleman* that put the lady into her coach, and purſued them again that day; and gave out that he would force the daughter from them, ſo that the mother was fain to hire men to guard the inn that night.

This matter was tranſacted in *March* was twelve-months.

The Doctor, at the laſt aſſizes at *Hereford*, meeting *the gentleman* who was the principal manager of the family, and helped to guard the daughter to *London*, he being a barriſter at law, and a near relation to the young lady, in his gown, aſſaulted him, and beat him ſeverely with a cane; whereupon the Judge of aſſize bound him to appear the firſt day of this Term in this court.

* [132]

And upon all this matter being put together, and an oath by her, * that ſhe believed the aſſault upon her kinſman to be in purſuance of the deſign upon her daughter; and that ſhe was informed he threatened her, and endeavoured to corrupt her daughter's maid, to facilitate his ſtealing the daughter;

Per Curiam, The doctor's coming in that manner, in deſpight of the mother's prohibition, and againſt her will, was good cauſe to require the *ſecurity of the peace*; and ſo was the enſuing behaviour of *the Doctor* upon the road.

Secondly, This demand of the *ſecurity of the peace* ought to be freſh after the fray or cauſe of fear given, and therefore if it had not been for the new aſſault upon the kinſman, the Court would not bind him to the peace here; for the ſuffering conſiderable time to paſs before the demand of ſecurity, is a great ſign that the party was not afraid.

12. Mod. 565. Fitzg. 268. 2. Peer Wms. 202.

But here there being an old offence, which one ought to give ſecurity of peace for, and a freſh occaſion given, which gives probable reaſon to believe the old grudge continued,

3. Peer. Wms. 203.

The Court ordered him to give ſecurity to keep the peace, and took his own recognizance in two hundred pounds, and that of two more in one hundred pounds each, but refuſed to bind him to his good behaviour, becauſe of the length of time; though they declared, that if they had come when the matter was freſh, they would have bound him to his *good behaviour*, and in a much greater ſum.

The cauſes for demanding *ſurety of the peace* muſt appear in the articles.

Note, All the cauſes of binding to the peace ought to appear in the articles which are ſworn by the party, and read in preſence of the other.

And

And one that gives ſecurity of peace muſt ſtand upon his recognizance for a year and a day.

Recognizance to keep the peace muſt be for a *year and a day.*

And the condition of a recognizance to keep the peace is to keep peace towards all the king's ſubjects, and particularly towards the perſon that demands it (*a*).

Recognizance to keep the peace to *all perſons.*

(*a*) A recognizance to *A. B.* for a year or for life, or without expreſſing any certain time (in which caſe it ſhall be intended to be for life), or without fixing any time or place for the party's appearance, or without binding him to keep the peace againſt all the king's people in general, it is ſaid, is good. 1. Hawk. P. C. ch. 60. ſ. 15. The Court are not confined to time, but may require bail for ſuch a period as they ſhall think neceſſary for the preſervation of the peace; Rex v. Bowes, 1. Term Rep. 696.

Shuttle *againſt* Wood. Caſe 179.

DEBT upon *a recognizance* given in common-pleas brought in this court.

Debt lies in the *king's bench* on a recognizance of bail taken in the *common-pleas*, but it ſhall be diſcharged if the principal be ſurrendered in *eight days* in full Term, after return of proceſs.

RAYMOND moved to have the action diſcharged, for that the defendants had ſurrendered the *principal*, even before the action commenced; and now by A RULE OF COURT (*a*) here, if debt be brought upon a recognizance of this court, the defendant has *eight days* in full Term to render the principal, whereby defendants have now equal advantage in the caſe of debt and *ſcire facias* upon a recognizance.

S. C. ante, 42. S. C. 1. Salk. 564. 659. S. C. Holt, 612. Poſt. 159. Hob. 195. Aleyn, 12. 1 Cro. 312. 1. Roll. Abr. 60. 1. Salk. 101. 2. Salk. 564. 600. 1. Barnes, 50. 76. 8. Mod. 340. 11. Mod. 253. 12. Mod. 650. 1. Ld. Ray. 720. 156. Tidd's Practice, 146. Sell. Pract. 178. 1. Com. Dig. 697. 1. Wilſ. 316. 3. Com. Dig. "Debt" (A. a.).

DEB anſwered, that though that be a rule in this court, yet there is no ſuch rule in the common-pleas; and this being upon a recognizance of the common-pleas, we muſt do in it as would be done there if the action were brought there.

THE WHOLE COURT ſaid, that he ſhould have the ſame ſauce here as in the common-pleas. Formerly they would not ſuffer an action upon *a recognizance* in this court, becauſe of the greater * miſchief it would be to a defendant than a *ſcire facias*; but ſurely the action was always well maintainable; and our rule is in avoidance of that miſchief.

RAYMOND was directed to enquire how the courſe of common-pleas was, for they muſt guide themſelves thereby here in this caſe.

PER CURIAM. Anciently there could be no proceedings on a bail-bond until the next Term, and it is a great grievance to put it in ſuit until after a convenient time; though it is otherwiſe practiſed in the common-pleas by the attornies, merely to make work for themſelves.

(*a*) Rule Trinity Term, 1. *Queen Anne*, 1. Salk. 101.

Caſe 180.

Anonymous.

A *deviſe* is to be favoured as much as an *heir at law*. 2. Bl. Com. 13.

PER CURIAM. A *will*, when clear, and the intent of the parties fully appears, is as much to be favoured as any *heir at law* (*a*).

(*a*) But if the intention of a teſtator be ever ſo apparent, the *heir at law* will inherit unleſs the eſtate is compleatly diſpoſed of to ſomebody elſe. Den *v.* Gaſkin, Cowp. 661.

Caſe 181.

Southers's Caſe.

THE MARSHAL is bound to take notice of commitments in court. Poſt. 183. 1. Salk. 272.

SOUTHERS, *marſhal*, was complained againſt by WHITACRE, for that he wilfully ſuffered a perſon brought up upon a *habeas corpus*, and committed in court, to eſcape.

The marſhal, without more ado, is obliged to take notice of all commitments in court.

There ſhall be but one *habeas corpus*, though in cuſtody upon a *criminal* and a *civil* matter.

PER CURIAM. If one be in cuſtody upon a criminal and alſo upon a civil matter, and he would move himſelf up by *habeas corpus*, there ought to be but one *habeas corpus* either on *the crown-ſide* or on *the plea-ſide*, and both cauſes ought to be returned. Tidd's Pract. 171.

Caſe 182.

The Queen *againſt* The Town of Clitheroe.

The old bailiffs of a town are obliged to return a *mandamus*. Ante, 25. Inſt. Leg. 159. 2. Salk. 431. 699. 701. 12. Mod. 126. 251. 322. Ld. Ray. 848. 885. Stra. 640. 808. 895.

A MANDAMUS was to the bailiffs of the town of *Clitheroe*, to ſwear in ſuch and ſuch perſons into the office of bailiffs.

BROTHERICK moved, that they ſhould not be obliged to make a return, for they could not well do it, becauſe the writ was not directed to them in their natural capacities, and by their names, and two other perſons were bailiffs, ſo that it would be hard to put them to make a return.

But PER CURIAM, If you, when bailiffs, have ſworn in others who were not rightly choſen, you notwithſtanding continue bailiffs ſtill, and therefore ought, as ſuch, to make a return to the queen's writ. And they were ordered to make a return.

A *mandamus* may be amended before the return.

And here HOLT, *Chief Juſtice*, ſaid, They might amend the writ at any time before it was returnable; but that they on the other ſide could not, except to quaſh it until a return thereto was made and filed (*b*).

(*b*) The Court will not amend a *mandamus* after a return has been made to it. Rex *v.* The Mayor of Stafford, 4. Term Rep. 689.

Adams

Adams *againſt* the Terre-tenants of Savage. Caſe 183.

DORSET, *to wit.* THE lord the king hath ſent to the ſheriff of the county of *Dorſet* his writ cloſe in theſe words, to wit, *William the Third*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland* king, defender of the faith, &c. to the ſheriff of *Dorſet*, greeting: Whereas *Sarah Adams*, widow, lately in the court of the lord *Charles the Second*, late king of *England*, before the late king himſelf at *Weſtminſter*, to wit, in Eaſter Term, in the thirty-fourth year of the reign of the ſame late king, by bill, without the writ of the ſaid late king, and by the judgment of the ſame court, hath recovered againſt *George Savage*, *Knight*, otherwiſe called *George Savage of Blaxworth* in the county of *Dorſet*, *Eſq.* as well a certain debt of two hundred pounds as forty ſhillings for her damages which ſhe hath ſuſtained as well by reaſon of the detention of that debt, as for her coſts and charges by her about her ſuit in that behalf expended, whereof he is convicted, as by the record and proceedings thereof in our court before us now remaining manifeſtly appears: nevertheleſs execution of the judgment aforeſaid yet remains to be executed, and as well the ſaid *George* as the ſaid *Sarah* are dead, as by the ſuggeſtion of *John Adams*, the adminiſtrator of the goods and chattels, rights and credits, which belonged to the ſaid *Sarah Adams* at the time of her death, we have in our court before us lately underſtood; and becauſe we are willing that thoſe things which in the ſaid court of the ſaid late king were lawfully tranſacted ſhould be carried into due execution, we command you, that by good and lawful men of your bailiwick you give notice to the tenants of all the lands and tenements in your bailiwick of which the ſaid *George Savage* was ſeiſed in fee-ſimple on *Saturday* next after three weeks of *Eaſter*, in the thirty-fourth year of the reign of the ſaid lord *Charles the Second*, late king of *England*, *&c.* aboveſaid, on which day the judgment aforeſaid was given, or ever after, that they be before us at *Weſtminſter* on *Friday* next after the octave of *Saint Martin*, to ſhew if they have or can ſay any thing for themſelves, why the debt and damages aforeſaid ought not to be levied on thoſe lands and tenements, and paid to the ſaid *John*, according to the force, form, and effect of the recovery aforeſaid, if they ſhall think fit, and farther to do and receive what our ſaid court before us concerning them ſhall then and there conſider in this behalf; and have there then the names of thoſe by whom you ſhall give them notice, and this writ. Witneſs *J. Holt*, *Knt.* at *Weſtminſter*, the twenty-third day of *October*, in the thirteenth year of our reign.

The record of *niſi prius* in a *ſcire facias* by an adminiſtrator againſt the terre-tenants.
Salk. 40.
Mod. Caſ. 134.

HOLT, COLEMAN.

On which day, before the lord the king at *Weſtminſter* comes the ſaid *John Adams*, the natural ſon of the ſaid *Sarah Adams*, by *William Underwood*, his attorney, and ſays, that after the judg-

Death of the plaintiff in the judgment.

ADAMS *againſt* THE TENE-TENANTS OF SAVAGE.

ment aforeſaid in form aforeſaid given, to wit, on the tenth day of *May*, in the twelfth year of the reign of the lord the now king, at *Blaxworth* aforeſaid in the county aforeſaid, the ſaid *Sarah Adams* died inteſtate, being not paid the debt and damages aforeſaid; after the death of which ſaid *Sarah*, adminiſtration of all and ſingular the goods and chattels, rights and credits, which belonged to the ſaid *Sarah* at the time of her death by *Charles Sloper*, clerk, maſter of arts, official principal of the reverend *Robert Cooper*, clerk, maſter of arts, archdean of the archdeanery of *Dorſet* lawfully conſtituted, to whom the commiſſion of that adminiſtration of right belonged, on the twenty-firſt day of *July*, in the thirteenth year of the reign of the now king, at *Blaxworth* aforeſaid in the county aforeſaid, to the ſame *John* in due form of law was committed. And the ſheriff of the county of *Dorſet*, to wit, *W. Fitch*, *Eſq.* now returns, that he the ſaid *W. Fitch*, by virtue of the writ aforeſaid to him directed by *A. S.* and *W. M.* good and lawful men of his bailiwick, hath given notice to *D. Sadler* and *Philippa* his wife, tenants of the capital manſion-houſe with the appurtenants called *Blaxworth Houſe*, and of the manor of *Blaxworth* in his county; to *Philip Strickland*, tenant of a farm, meſſuage, or tenement, called the *Higher Farm*, and of one hundred and ninety-three acres of land, wood, meadow, and paſture, more or leſs, thereto belonging, ſituate, lying, and being within the pariſh of *Blaxworth* aforeſaid; and alſo tenant of one other farm, meſſuage, or tenement, called the *Middle Farm*, and of two hundred and eighty acres of land, wood, meadow, and paſture, more or leſs, thereto belonging, ſituate, lying, and being within the pariſh aforeſaid; and likewiſe tenant of one other farm, meſſuage, or tenement, called the *Lower Farm*, and eighty-ſix acres of land, wood, meadow, and paſture, more or leſs, thereto belonging, ſituate, lying, and being within the pariſh aforeſaid, late in the tenure or occupation of *H. Trenchard*; to *Jehonadab Savage*, tenant of one meſſuage or tenement, and eighty acres of land, meadow and paſture, with the appurtenances thereto belonging and appertaining; to *W. Savage*, tenant of one meſſuage or tenement, and ſixteen acres of land, meadow and paſture, with the appurtenances thereto belonging; to *P. Hayward*, tenant of three other meſſuages or tenements, and eighty acres of land, meadow and paſture, with the appurtenances thereto belonging; to *J. Dewey*, tenant of another meſſuage or tenement, and thirty acres of land, meadow and paſture, with the appurtenances thereto belonging; to *S. Hadderley*, tenant of one other meſſuage or tenement, and ſeven acres of land, meadow and paſture, with the appurtenances thereto belonging; to *J. Jefferies*, tenant of one other meſſuage or tenement, and forty acres of land, meadow and paſture, with the appurtenances thereto belonging; to *M. Alner*, widow, tenant of one other meſſuage or tenement, and forty acres of land, meadow and paſture, with the appurtenances thereto belonging; to *T. Laming*, tenant of one other meſſuage or tenement, and thirty acres of land, meadow and paſture, with the appurtenances thereto

Adminiſtration granted.

It ſhould have been granted by the metropolitan.

The return.

thereto belonging and appertaining; to *N. Fry*, tenant of one other meſſuage or tenement, and twenty acres of land, meadow and paſture, with the appurtenances thereto belonging; to *W. Durham*, tenant of one other meſſuage or tenement, and twelve acres of land, meadow and paſture, thereto belonging; to *T. Durrant*, tenant of one other meſſuage or tenement, and five acres of land, meadow and paſture, with the appurtenances thereto belonging; to *J. Thomas*, tenant of one other meſſuage or tenement, and ten acres of land, meadow and paſture, with the appurtenances thereto belonging; to *W. Alner*, tenant of another meſſuage or tenement, and ſeventy acres of land, meadow and paſture, with the appurtenances thereto belonging; to *M. Wheeler*, widow, tenant of one other meſſuage or tenement, and ſixteen acres of land, meadow and paſture, with the appurtenances thereto belonging; to *J. Mannell*, tenant of one other meſſuage or tenement, and ſixteen acres of land, meadow and paſture, with the appurtenances thereto belonging; to *G. Sheering*, tenant of one cottage and half an acre of land thereto belonging; to *Pelham*, widow, tenant of one meſſuage or tenement, and ſeventy acres of land, meadow and paſture, with the appurtenances thereto belonging; to *P. Maver*, tenant of one other meſſuage or tenement, and three acres of land, meadow and paſture, with the appurtenances thereto belonging; to *C. Billis*, tenant of one other meſſuage or tenement, and four acres of land, meadow and paſture, with the appurtenances thereto belonging; all and ſingular which ſaid lands and tenements laſt-mentioned are in the manor of *Blaxworth* aforeſaid, and ſituate lying and being within the pariſh of *Blaxworth* aforeſaid, of which *George Savage, Knt.* in the writ aforeſaid named, on the day of the rendition of the judgment in the ſaid writ ſpecified, and after, was ſeiſed in his demeſne as of fee; that they and every of them ſhould be before the ſaid lord the king at the day and place in the ſaid writ contained, to ſhew, do, and receive as that writ commands and requires. And he farther certifies to the ſame lord the king, that there are not, nor is, any other tenants or tenant of any other lands or tenements of which the ſaid *George Savage*, on the ſaid day of the rendition of the judgment aforeſaid, or ever after, was ſeiſed in his demeſne as of fee in his bailiwick, to whom he could give notice: And hereupon the ſaid *John Adams* produces here in court the letters of adminiſtration aforeſaid to the ſaid *Sarah*, whereby it ſufficiently appears to the Court here, that he the ſaid *John Adams* is adminiſtrator, and thereof hath the adminiſtration, &c. And the ſame *John Adams* prays execution thereof againſt the ſaid *Daniel Sadler* and *Philippa* his wife, *Philip Strickland*, *Jehonadab Savage*, *William Savage*, *Peter Hayward*, *James Dewey*, *Simon Hadderley*, *Joſeph Jefferies*, *Mary Alner*, widow, *Thomas Laming*, *Nathaniel Fry*, *William Durham*, *Thomas Durrant*, *John Thomas*, *William Alner*, *Margaret Wheeler*, widow, *Joſeph Mannell*, *George Sheering*, *Pelham*, widow, *Peter Maver*, and *Chriſtopher Billis*, for the

ADAMS *againſt* THE TERRE-TENANTS OF SAVAGE.

debt and damages aforeſaid, on the lands and tenements aforeſaid to be levied, to be adjudged to him, &c.

Plea, that the defendant had nothing in the land at the time of the judgment.

And the ſaid *Daniel Sadler* and *Philippa* his wife, *Philip Strickland*, *Jebonadab Savage*, *Peter Hayward*, *James Dewey*, *Simon Hadderley*, *Joſeph Jefferies*, *Mary Alner*, widow, *Thomas Laming*, *Nathaniel Fry*, *William Durham*, *Thomas Durrant*, *John Thomas*, *William Alner*, *Margaret Wheeler*, widow, *Joſeph Mannell*, *George Sheering*, *Pelham*, widow, *Peter Maver*, and *Chriſtopher Billis*, on the ſame *Friday* next after the octave of *St. Martin*, being ſolemnly called by *Peter Templeman* their attorney, come and ſay, that the ſaid *John Adams* ought not to have his execution againſt them for the debt and damages aforeſaid on the manor, meſſuages, cottage, lands, and tenements aforeſaid, in the return of the ſaid writ of *ſcire facias* mentioned, whereof they are returned tenants; becauſe they ſay, that the ſaid *George Savage, Knt.* in the writ aforeſaid of *ſcire facias* mentioned, or any other perſon or perſons to the uſe of him the ſaid *George Savage* and his heirs at the time of the rendition of the judgment aforeſaid in the ſame writ above-mentioned, or ever after, was not, nor were ſeiſed of the ſame manor, meſſuages, cottage, lands, and tenements, or of any parcel thereof, in his demeſne as of fee: and this they are ready to verify: wherefore they pray judgment if the ſaid *John Adams* ought to have his execution againſt them for the debt and damages aforeſaid on the manor, meſſuages, cottage, lands, and tenements aforeſaid, &c.

Replication that he was ſeiſed in fee.

And the ſaid *John Adams* ſays, that he by anything by the ſaid *Daniel Sadler* and *Philippa* his wife, *Philip Strickland*, *Jebonadab Savage*, *William Savage*, *Peter Hayward*, *James Dewey*, *Simon Hadderley*, *Joſeph Jefferies*, *Mary Alner*, widow, *Thomas Laming*, *Nathaniel Fry*, *William Durham*, *Thomas Durrant*, *John Thomas*, *William Alner*, *Margaret Wheeler*, widow, *Joſeph Mannell*, *George Sheering*, *Pelham*, widow, *Peter Maver*, and *Chriſtopher Billis*, before alledged, ought not to be delayed from having his execution aforeſaid againſt them for the debt and damages aforeſaid on the manor, meſſuages, cottage, lands, and tenements aforeſaid, in the ſaid return of the writ of *ſcire facias* aforeſaid mentioned, whereof they are returned tenants; becauſe he ſays, that the ſaid *George Savage, Knt.* on the ſaid day of the rendition of the judgment aforeſaid in the writ aforeſaid above-mentioned, and long after, was ſeiſed of the ſame manor, meſſuages, cottage, lands, and tenements, in his demeſne as of fee, as by the return of the writ aforeſaid is above ſuppoſed: and this he prays may be inquired of by the country. And the ſaid *Daniel Sadler* and *Philippa* his wife, *Philip Strickland*, *Jebonadab Savage*, *William Savage*, *Peter Hayward*, *James Dewey*, *Simon Hadderley*, *Joſeph Jefferies*, *Mary Alner*, widow, *Thomas Laming*, *Nathaniel Fry*, *William Durham*, *Thomas Durrant*, *John Thomas*, *William Alner*, *Margaret Wheeler*, widow, *Joſeph Mannell*, *George*

George Sheering, *Pelham*, widow, *Peter Maver*, and *Chriſtopher Billis*, thereof likewiſe, &c. Therefore let a jury thereon come before the lord the king at *Weſtminſter* on *Thurſday* next after the octave of the *Purification of the Bleſſed Virgin Mary*, and who neither, &c. to recognize, &c. becauſe as well, &c. The ſame day is given to the parties aforeſaid there, &c.

ADAMS *againſt* THE TERRE-TENANTS OF SAVAGE.

* Adams *againſt* The Terre-tenants of Savage. Caſe 184.

THE plaintiff brought a *ſcire facias* againſt the defendants, reciting a judgment obtained by his inteſtate againſt *Savage* in ſuch a Term and year in the king's bench at *Weſtminſter*, commanding the ſheriff to warn in all the tenants of lands whereof *Savage* at the time of the judgment was ſeiſed; and in the count, in the end of the writ, he ſhews that his inteſtate died ſo, &c. and adminiſtration of all his goods and chattels were committed to him the plaintiff by *J. S. Archdeacon of Dorſet* in the county of *Dorſet*, to whom it did belong to grant it.

Archdeacons have only a *preſcriptive* and not a *common right* to grant adminiſtrations; and a judgment is *bona notabilia* in the place where it is given; if therefore a judgment be given at *Weſtminſter*, and the adminiſtrator of the plaintiff bring a *ſcire facias* againſt the *terre-tenants* of the defendant, ſtating that the inteſtate died on ſuch a day, and that adminiſtration was committed to him by the *archdeacon of Dorſet*; the Court will *ex officio* take notice that the adminiſtration, as to this judgment, is *void*; and the adminiſtrator ſhall *take nothing by his writ*.

The *terre-tenants* returned traverſe the ſaid *Savage*'s being ſeiſed of any of the lands whereof they are returned tenants; and it was found againſt them.

DARNELL, *Serjeant*, in laſt *Eaſter Term* was twelvemonth, moved in arreſt of judgment, that the plaintiff in his writ ſhews that he has not a right to revive the judgment, for this judgment is *aſſets* here at *Weſtminſter*, where the record lies; and the adminiſtration committed by the *Archdeacon of Dorſet*, which he ſhews for his title, is utterly void, here being *bona notabilia* out of his juriſdiction.

EYRES to this offered for anſwer, that though the Court will judicially take notice of eccleſiaſtical diviſions, as that there are two *provinces*, and ſo many *dioceſes* in every province, as they will do of all the ſeveral counties of *England*; yet they cannot take judicial notice within what dioceſe ſuch or ſuch a place is, no more than they will within what county ſuch a hundred is: ſo they cannot take notice here but that the *Archdeaconry of Dorſet* is within the *dioceſe of London*, and then this may be an adminiſtration well committed.

SECONDLY, Since we have averred that it belongs to him to grant it, and that he did grant it, you will give him that credit as to believe that he did it well, at leaſt until the contrary appear, which cannot be here.

PER CURIAM. We who ſit here, and hold the queen's courts, are bound to take notice under what eccleſiaſtical juriſ-

S. C. Poſt. 199. 226.

S.C. 1. Salk. 40. S.C. 2. Salk. 601. 679.

S.C. 3. Salk. 321.

S. C. Lilly Ent. 398.

7. Mod. 15. 1. Lut. 399, 400. 12 Salk. 39, 40. Carth. 148 3. Mod. 324. Poſt. 241, 242. 2. Mod. 65. 5. Mod. 225. 1. Com. Dig. "Adminiſtrator," (B. 4.) 8. Mod. 225. 244. 10. Mod. 272. 11. Mod. 223. 12. Mod. 107. 385. 2. Barnes, 137, 142. Stra. 412. 631 716. 781. 1. Ld. Ray. 562. 2. Ld. Ray. 855. Com. Rep. 17. 1. Peer Wms. 76. 3. Peer Wms. 349. 370.

ADAMS *against* THE TERRE-TENANTS OF SAVAGE.

diction we are; and if ſo, we muſt ſee that we are not under the *Archdeacon of Dorſet*; and by conſequence, an adminiſtration granted by him cannot intitle one to bring an action upon our judgment: Archdeacons as ſuch have no power to commit adminiſtration, though moſt in *England* do it, but not *quatenus* archdeacons, but by a preſcriptive right, and ſometimes they do by *peculiars*, and ſometimes by themſelves; and in thoſe caſes you muſt plead *cui adminiſtratio in hâc parte pertinuit*; and here the adminiſtration is abſolutely void, and ſo would be if committed by the biſhop, whoſe archdeacon this man is. And ſuppoſe, as it is urged, that we cannot take notice but that the *archdeaconry* of *Darſet* is part of the *dioceſe* of *London*, yet at leaſt we muſt take notice that the place where we ſit here is not of it; and the adminiſtration *quoad* this judgment is void,

* [135]

If an adminiſtrator bring a *ſcire facias* on a judgment recovered at *Weſtminſter*, ſtating himſelf "adminiſtrator," and reciting, as his title to ſue, letters of adminiſtration granted by the *archdeacon of Dorſet*, the error of ſuing for *bona notabilia* in one dioceſe on adminiſtration granted in another, is not cured by the terre-tenants pleading to *the merits*, and omitting to traverſe the validity of the adminiſtration; nor can the words "by "the *archdeacon* "*of Dorſet*" be rejected as ſurpluſage; but if he had only alledged himſelf generally, "adminiſtrator of "the goods, &c." it would have been good.—Sty. 383. Cro. Jac. 10. 1. Sid. 238. 2. Vent. 84. Hob. 117.

* And this Term BROTHERICK moved for judgment upon this ground, *viz.* that though the plaintiff has ſhewn a bad title, yet the writ of *ſcire facias* being good, and he calling himſelf *adminiſtrator*, and the defendants not traverſing, or taking any advantage of the invalidity of the adminiſtration, but pleading to the merits, they thereby admit the perſon intitled to ſue, and ſhall not come, when the right is tried againſt them, to controvert what they have before waived to inſiſt upon, but have admitted: and here if we had not ſaid any thing by whom adminiſtration was committed to us, and they had thus pleaded over, it had been good. In the caſe of *Gidley v. Williams*, in this court (*a*), an adminiſtrator brought an action of debt upon a bond to the inteſtate, ſetting forth, that *Gidley* was adminiſtrator of ſuch a one, and that the defendant did not pay to the teſtator in his life, or to *Gidley* the adminiſtrator ſince his death; but he did not alledge that adminiſtration was committed to him; and after *non eſt factum* pleaded, and a verdict for the plaintiff, it was moved, that the defendant had admitted the plaintiff to be adminiſtrator by pleading in chief, and the opinion of the Court was, that the declaration was made good; for *per Curiam*, though that would be a fatal exception upon *demurrer*, it is helped by the pleading over *non eſt factum*, whereby you admit him capable to ſue. And as this caſe ſtands, if we had ſaid only that we were adminiſtrators, or that adminiſtration was committed to us, without more, we ſhould have judgment; then there being enough ſaid, that adminiſtration was committed to us, the other words, "by the *Archdeacon of* "*Dorſet*," ſhall be rejected; and for rejecting words that would vitiate matter which was well without them, he quoted the caſe of *Bold v. Steers* (*b*), where a leaſe was made to begin after the death of *Thomaſine Chapman* and of *Thomas Chapman*; and it was alledged that the *aforeſaid Thomaſine Chapman* and *Thomas Chapman* were dead;

(*a*) Trinity Term, 12. *Will.* 3. 12. Mod. 443. 1. Salk. 37. 1. Ld. Ray. 634. See alſo Dawes *v.* Harriſon, 2. Mod. 65.

(*b*) Cro. Eliz. 697.

dead; and it was held, that the words "the aforeſaid *Thomas*" were ſufficient, and the addition of his ſurname vain, and therefore would not vitiate. A parſon made a leaſe (*a*), and was deprived by his ordinary, from which ſentence he appealed to the archbiſhop; after deprivation and before the appeal another became parſon, and made a leaſe; and, in the conteſt between the two leſſees, the ſecond pleaded the deprivation of the leſſor of the firſt; to which they replied, that he had appealed from the ſaid ſentence to the archbiſhop *in curiâ prærogativâ ſuâ de arcubus*; and though the *court of prerogative* be not the *court of arches*, yet the Court held, that it ſufficed to ſhew an appeal to the archbiſhop's prerogative court, and the reſt, rather than vitiate, ſhould be rejected. In an avowry for rent (*b*), the avowant made title as grantee of a reverſion, without ſhewing *attornment*; the defendant pleaded *rien arreare*; and it was held, that though upon *demurrer* the want of ſhewing *attornment* would be fatal, yet it would be well enough now, becauſe the defendant admitted it by his plea.

ADAMS *againſt* THE TERRE-TENANTS OF SAVAGE.

* BUT NOTE, There is another reaſon given for that judgment, *viz.* that it was after verdict, and ſo cured by the ſtatute. And he ſaid, the judgment muſt be upon the writ and return, and not upon the declaration, for by pleading over they allowed that to be well. * [136]

DARNELL, *Serjeant*, anſwered, That here they not only not ſhewed that they had a title, but that they had a bad one: they took upon themſelves to ſhew a title, and have ſhewed a bad one; and when they ſhew and ſet out a bad one, the Court cannot intend that they have a good one, but, on the contrary, that they have ſhewed the beſt they can. And he utterly denied, that a miſtake in ſetting out that which was not neceſſary to ſet out, would not hurt; for if a man will take upon him to plead a general act of parliament ſpecially, and fails therein, though he need not to have ſet it out ſpecially, yet it will ſpoil all: and if they have judgment in this caſe, the defendant would be liable to the action of an adminiſtrator of the archbiſhop.

HOLT, *Chief Juſtice*. If the plaintiff had not ſet forth what kind of adminiſtration he claimed by, but had only generally alledged himſelf "adminiſtrator of the goods and chattels of the inteſtate," and the defendant had not put you upon ſhewing it by craving *oyer* of the *letters of adminiſtration*, as he might have done, but had pleaded over, it would have been an admiſſion of the plaintiff's having a right of ſuing as adminiſtrator, as he had alledged. It is true, the writ need not mention any thing of adminiſtration's being committed to the plaintiff; but the courſe is, to ſuggeſt upon THE ROLL after the writ is come in, that adminiſtration was committed to him, and to *profert* the *letters of adminiſtration* to ſhew it: but in debt, or *ſcire facias* on a judgment 12. Mod. 442. 537.

(*a*) Sir T. Jones, 219. Dyer, 240. pl. 56. (*b*) Palm. 74. 2. Lev. 234.

here

ADAMS against THE TERRE-TENANTS OF SAVAGE.

here at *Weſtminſter*, which is local, you make your title as adminiſtrator by virtue of letters of adminiſtration by the *Archdeacon of Dorſet*, and without doubt that is no good title; and when you yourſelf affirm this to be your title, how can we intend that you have another? for of your own ſhewing this is your title, which is manifeſtly bad. There is a vaſt difference, where a title does not appear fully for the plaintiff, and the party will not controvert with him about that; for there, if the party were not well ſatisfied with plaintiff's title, it may be well preſumed that he would have inſiſted on it in due time; and where the plaintiff himſelf ſhews that he has no title, for there the Court has no room for intendment.

THE WHOLE COURT agreed, that where the matter is indifferent to be well or ill, and the party pleads over, they will intend it well; and ſaid that all the caſes put by BROTHERICK were, where it was indifferent: and this properly is not an imperfection in ſhewing of *letters of adminiſtration*, but it is ſhewing ſuch as are abſolutely void as to the inteſtate's whole eſtate, becauſe there are *bona notabilia*.

*[137] * But THE COURT doubted what judgment to give, whether to *quaſh the writ* or to *bar the action*, and took time to conſider of that (*a*).

A judgment arreſted in *ſcire facias* will not intitle the defendant to *coſts* under the 8. and 9. *Will.* 3. c. 11.

And after, before any judgment entered, the defendant moved for *coſts* upon the ſtatute of 8. & 9. *Will.* 3. c. 11. the words whereof are, "that in all ſuits upon any writ or writs of *ſcire* "*facias* the plaintiff obtaining judgment, or any award of exe-"cution, after plea pleaded or demurrer joined therein, ſhall like-"wiſe recover his coſts of ſuit; and if the plaintiff ſhall become "nonſuit, or ſuffer a diſcontinuance, or a verdict ſhall paſs againſt "him, the defendant ſhall recover his coſts, and have execution "for the ſame by *capias ad ſatisfaciendum*, *fieri facias*, or *elegit*."

DARNELL, *Serjeant*, inſiſted, that if this had been a *ſpecial verdict*, until Court had determined the point, it was not *a verdict* for either ſide; but now that they were of opinion that the plaintiff ought to have no judgment, it would be the ſame as if it had been a *ſpecial verdict*, and then it would have been for the defendant (*b*), and it is within the miſchief remedied by the ſtatute, for here the plaintiff knew and ſhewed that he had no right to give the defendant trouble: and if this *ſcire facias* had been brought by him as adminiſtrator of *J. S.* and had recited a judgment obtained by *J. N.* ſhould not we have coſts?

(*a*) It is ſaid in the report of the ſame caſe in *Salkeld*, that the *ſcire facias* was abated by judgment *quod nihil capiat per breve*, which, in this caſe, THE COURT ſaid was a bar to the *action of the writ*, but not to *the action*; and that the reaſon of the judgment was, becauſe the plaintiff having made this adminiſtration his title, the Court could not intend any other, and the pleading over could not admit *that* to be a title which to the Court appeared to be no title, S. C. Salk. 40.: and by THE WHOLE COURT, judgment was given for the defendant. S. C. 2. Ld. Ray. 856. See alſo S. C. poſt. 199. 226.

(*b*) See Alſop *v.* Cleydon, Cro. Eliz. 465.

HOLT,

HOLT, *Chief Juſtice.* No; becauſe it is out of the words of the ſtatute, if the plaintiff have a verdict, as here: and our judgment may be, "*ſicet* verdict be for plaintiff (*a*), *quia apparet Curiæ* that he "has no right to recover; *ideo conſideratum quòd nil capiat per "billam.*"

Avaſon against THE TENANTS OF SAVAGE.

And IT WAS ADJUDGED that there ſhould be no coſts (*b*).

(*a*) See 1. Vent. 33.

(*b*) This ſtatute does not extend to *executors* or *adminiſtrators*, Bellew *v.* Aylmer, 1. Stra. 188. and therefore if plaintiff or defendant ſue or be ſued in that capacity, he is not liable to coſts, Hullock on Coſts, 303. See alſo Hiner *v.* Whitbread, Prac. Reg. 378. that if the defendant has appeared to, or pleaded in abatement of a *ſcire facias*, he ſhall have no coſts, although the writ be quaſhed on the motion of the plaintiff; but if there be no appearance entered, or plea pleaded, the plaintiff in ſuch caſe ſhall pay coſts, Pocklington *v.* Peck, 1. Stra. 638.

Anonymous.

Caſe 185.

IN a caſe where *Mr. M.* formerly *an attorney* of the court, now *counſellor at law*, was accuſed of foul practice in his profeſſion,

A barriſter may be puniſhed for mal-practice.

Qu. Whether being called to *the bar* diſcharges a perſon from being *attorney.*

THE COURT ſaid, though he be now *a counſel*, yet perhaps that will not diſcharge him from being *an attorney* ſtill; and then we may get his demands taxed as ſuch: And does any body think but a *counſellor at law* is a kind of miniſter of juſtice and right, and, as ſuch, puniſhable for miſbehaviour in his profeſſion?

3. Burr. 1256. 2. Hawk. P. C. ch. 22. ſ. 30.

And HOLT, *Chief Juſtice*, ſaid to him, Will you have the point tried, Whether a *counſellor at law* may commit extortion? and with reſpect to the circumſtances of this caſe, ſaid, that this was dragooning of people out of their money.

The Queen *againſt* Beſt and Others.

Caſe 186.

LONDON (*to wit*), HERETOFORE, that is to ſay, on *Friday* the fourteenth day of *January*, in the ſecond year of the reign of our lady *Anne*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, queen, defender of the faith, &c. at the general quarter-ſeſſions of the peace of the lady the queen, holden for the city of *London* at the *Guildhall* of the ſaid city, and within the ſame city, before *John Parſons*, knight, mayor of the city of *London*, *Robert Clayton*, knight, *William Pritchard*, knight, *William Gore*, knight, aldermen in the city aforeſaid, and *Salathiel Lovel*, one of the ſerjeants at law of the ſaid lady the queen, and recorder of the ſaid city, and others their fellows juſtices, aſſigned to keep the peace in the city aforeſaid, and alſo to hear and determine divers felonies, treſpaſſes, and other miſdemeanors committed within the ſame city, by the oath of twelve jurors, honeſt and lawful men of the city of *London* aforeſaid, then and there being ſworn and charged to inquire for the ſaid lady the queen for the

An indictment for conſpiring falſely to charge another with being the father of *a baſtard*, is good, although it do not aver that the defendant was *not the father*; for the conſpiracy is the *gift* of the offence.

THE QUEEN *againſt* BEST AND OTHERS.

the body of the city aforeſaid, it was preſented, that *Richard Beſt*, late of *London*, yeoman, *Philip Jackſon*, late of *London*, yeoman, *Richard Grimes*, late of *London*, yeoman, and *Elizabeth Church*, late of *London*, ſpinſter, otherwiſe called *Elizabeth Ellis*, late of *London*, ſpinſter, otherwiſe called *Elizabeth Carter*, late of *London*, ſpinſter, being perſons of evil name, fame, and diſhoneſt converſation, and not endeavouring to ſeek their living by honeſt labour, according to the laws of this kingdom of *England*, but compaſſing, deviſing, and conſpiring among themſelves by what unlawful means they might unlawfully and unjuſtly obtain and acquire into their hands and poſſeſſion the goods, chattels, and money of the honeſt liege men and ſubjects of the ſaid lady the queen, to maintain their diſhoneſt and diabolical courſe of living, on the eighteenth day of *December*, in the ſecond year of the reign of our lady *Anne*, by the grace of God, of *England*, *Scotland*, *France*, and *Ireland*, queen, defender of the faith, &c. falſely, unlawfully, wickedly, and craftily contriving, intending and conſpiring and deviſing among themſelves to deceive and defraud one *Peter Pickering* the younger, of *London*, mercer, not only of his money, but alſo to deprive him the ſaid *Peter* of his good name, fame, eſtate, and credit, and to bring the ſaid *Peter* into the greateſt hatred, ſcandal, contempt, and infamy, amongſt all the liege men and ſubjects of the ſaid lady the queen, on the eighteenth day of *December* in the ſecond year aboveſaid at *London* aforeſaid in the pariſh of *Saint Vedaſt*, otherwiſe *Foſter's*, in the ward of *Farringdon Within*, falſely, unlawfully, deceitfully, maliciouſly, and for the cauſe of wicked gain conſpired, contrived, conſulted, and agreed among themſelves falſely, unjuſtly, wickedly, and diabolically to charge and accuſe the ſaid *Peter Pickering* to be the father of a child whereof the ſaid *Elizabeth Ellis*, otherwiſe *Church*, otherwiſe *Carter*, was then pregnant, as they then and there pretended; and by the conſpiracy among them ſo as aforeſaid before had, then and there with force and arms, &c. they did falſely and maliciouſly affirm, and every one of them then and there did falſely and maliciouſly affirm, that he the ſaid *Peter* then lately before had carnal knowledge of the body of her the ſaid *Elizabeth Church*, otherwiſe *Ellis*, otherwiſe *Carter*, and had carnally known the ſaid *Elizabeth Ellis*, otherwiſe *Church*, otherwiſe *Carter*, and that he the ſaid *Peter* was the father of the pretended child whereof the ſaid *Elizabeth Church*, otherwiſe *Ellis*, otherwiſe *Carter*, then was pregnant, as ſhe aſſerted and pretended: and that for the further execution of the premiſes, they the ſaid *Richard Beſt*, *Philip Jackſon*, *Richard Grimes*, and *Elizabeth Church*, otherwiſe *Ellis*, otherwiſe *Carter*, then and there agreed and concluded amongſt themſelves, that he the ſaid *Richard Beſt* ſhould go to the ſaid *Peter*, and ſhould falſely, wickedly, maliciouſly, and for the ſake of wicked gain ſhould charge and accuſe him the ſaid *Peter*, that he the ſaid *Peter* then lately before had had carnal knowledge of the body of the ſaid *Elizabeth Church*, otherwiſe *Ellis*, otherwiſe *Carter*, and had carnally known her the ſaid *Elizabeth Church*, otherwiſe *Ellis*, otherwiſe

wiſe *Carter*, and that he the ſaid *Peter* was the father of the ſaid pretended child whereof they pretended that ſhe the ſaid *Elizabeth* was pregnant. And the jurors aforeſaid upon their oath aforeſaid further ſay, that the ſaid *Richard Beſt*, in execution of the premiſes, and according to the ſaid conſpiracy, conſultation, and agreement among them the ſaid *Richard Beſt*, *Philip Jackſon*, *Richard Grimes*, and *Elizabeth Church*, otherwiſe *Ellis*, otherwiſe *Carter*, as aforeſaid before had, afterwards, to wit, on the ſaid eighteenth day of *December* in the ſecond year aforeſaid, at the pariſh and ward aforeſaid, and at divers other places within the city aforeſaid, with force and arms, &c. falſely, wickedly, maliciouſly, diabolically, and for the ſake of wicked gain, in the hearing of many faithful liege men and ſubjects of the ſaid lady the queen, charged and accuſed the ſaid *Peter*, that he the ſaid *Peter* then lately before had had carnal knowledge of the body of the ſaid *Elizabeth Church*, otherwiſe *Ellis*, otherwiſe *Carter*, and had carnally known her the ſaid *Elizabeth Church*, otherwiſe *Ellis*, otherwiſe *Carter*, and that he the ſaid *Peter* was the father of the ſaid pretended child whereof they affirmed the ſaid *Elizabeth Church*, otherwiſe *Ellis*, otherwiſe *Carter*, then was pregnant, to the great damage, ſcandal, and defamation of the ſaid *Peter Pickering* the younger, to the worſt and moſt pernicious example of all others offending in the like caſe, and againſt the peace of the ſaid lady the now queen, her crown, and dignity; which ſaid indictment the lady the now queen afterwards for certain cauſes hath cauſed to come to be determined before her: wherefore the ſheriffs of *London* were commanded, that they ſhould cauſe them to come to anſwer, &c. and now, to wit, on *Wedneſday* next after five weeks of *Eaſter*, in this ſame Term, before the lady the queen at *Weſtminſter*, come the aforeſaid *William Beſt*, *Philip Jackſon*, and *Elizabeth Ellis*, by *Benedict Brown* their attorney, and, having ſeverally heard the indictment aforeſaid, ſay, that they do not apprehend that the ſaid lady the queen will or ought farther to impeach or occaſion them the ſaid *Richard*, *Philip*, and *Elizabeth*, or any of them, for the premiſes, becauſe they ſay, that the indictment aforeſaid is not ſufficient in law, to which they and each of them have no neceſſity, nor are they bound by the law of the land in any manner to anſwer: and for the inſufficiency thereof they pray judgment, and that they may be diſmiſſed by the Court here concerning the premiſes, &c.

And *Samuel Aſtry*, knt. coroner and attorney of the lady the queen, in the court of the ſaid queen, before the queen herſelf, who proſecutes for the ſaid lady the queen, in this behalf for the ſaid lady the queen ſaith, that the indictment aforeſaid, and the matter therein contained, are good and ſufficient in law to compel them the ſaid *Richard Beſt*, *Philip Jackſon*, and *Elizabeth Ellis*, to anſwer the ſaid indictment: wherefore for want of a ſufficient anſwer in this behalf he prays judgment, and that they by the Court here may be convicted of the premiſes, &c.

THE

Caſe 187.

THE CASE.

An *indictment* will lie for a conſpiracy before acquittal, but not an *action on the caſe* till acquittal.

THE defendants were indicted for conſpiring to get money unjuſtly, &c. from one *Peter Pickering*, and to bring about that wicked purpoſe, *falſely* to charge him with being the father of a certain *baſtard child*, &c. and that in purſuance of ſuch conſpiracy they did *falſely* charge and affirm him to be the father of it.

The exception was taken, that it did not aver that he was not the father of it.

* [138]

S. C. poſt. 185. S. C. 1. Salk. 174. S. C. Holt, 151. S. C. 2. Ld. Ray. 1167. S. C. 3. Ld. Ray. 37. Poſt. 169. 185. Carth. 417. Skin. 44. 1. Salk. 13, 14, 15. 2. Mod. 152. Ld. Ray. 81.

PER CURIAM. The *gift* is the *falſely* conſpiring to charge falſely. And it is ſaid further, that they did falſely charge, &c. and *an indictment* lies for the falſehood before the party is acquitted of it; but *an action on the caſe* lies not * until acquittal: —and this was ſaid to be too frequent an offence to be quaſhed upon motion; that they would no more quaſh it than they would an indictment for *barratry*, or *keeping a bawdy-houſe*.

And it was denied to be quaſhed.

306. Poſt. 169. 1. Vent. 303. 8. Mod. 320. 1. Hawk. P. C. ch. 72. ſ. 2.

Caſe 188.

Kent *againſt* ———.

A record in treſpaſs *vi et armis* is not removed by a writ of error on a judgment in treſpaſs *on the caſe*.

ERROR of a judgment in treſpaſs *vi et armis* in the common pleas; and the writ was of a judgment in a plea of treſpaſs upon the caſe.

PER CURIAM. It is no good writ to remove the record; for though treſpaſs generally, and upon the caſe, may be laid *vi et armis*, yet there is very great diverſity between their natures; the one is grounded upon the *very unlawful act*; the other upon the *whole circumſtances* of the caſe.

A miſ-priſion of the clerk in making out a writ of error may be amended.

BUT IT WAS AGREED, that if right inſtructions had been given to the officer who made out the writ, and that were made out by affidavits, they would amend by the ſtatute of 8. *Hen.* 6. c. 12. ſ. 2.

8. Co. 160. b. Hob. 118. 129. Cowp. 407.

A writ of error cannot be quaſhed, until it is entered on THE ROLL.

And PER CURIAM, The defendant cannot move to quaſh the writ until it be entered on THE ROLL, and he appear to it.

And the writ was quaſhed *niſi*.

Caſe 189.

Anonymous.

A bill of exchange bears *intereſt* from the time it is demanded.—Beawes L. M. 461. Stra. 649. 910. 2. Burr. 1086. Kyd on Bills, 89, 90. 2. Term Rep. 52.

PER CURIAM. Intereſt upon a bill of exchange commences from demand made; and therefore if there be no demand made until action brought, the defendant may plead tender and

refuſal,

refuſal, and *uncore priſt*, and ſo diſcharge himſelf of intereſt; but if it be the defendant's fault that demand could not be made, as if he were out of the kingdom, there want of demand ought not to prejudice the plaintiff. ANONYMOUS.

Lewis *againſt* Jones. Caſe 190.

UPON a writ of error of a judgment in *Wales*, the *placita* were, &c. at a great ſeſſion of our *lord the king*, &c. holden "before *A.* and *R.* juſtices of our *lady the queen*, &c." A judgment at a ſeſſions of *the king* holden before *the queen*, is erroneous.

AND IT WAS HELD a fatal *variance*.

But IT WAS DOUBTED, Whether, if they would amend below, a *certiorari ad informandum conſcient.* ought not to go? On a writ of error on a judgment from *Wales*, a *certiorari* to inform the Court may iſſue, although the record has been *amended* before.

And at another day a motion was made by WILLIAMS for a *certiorari*, that they might amend below, and certify it right up.

But it appearing to THE COURT, that a former writ of error had been brought, and a *certiorari*, and an amendment of ſuch faults as had been then diſcovered, and that this was the ſecond writ and faults, ſtill they ſaid, they would conſider well of it before they would ſend any more *certiorari*'s: for when would there be an end at this rate?

And THE COURT gave leave to move again.

And it was afterwards granted, *abſente* HOLT, *Chief Juſtice*.

*[139]

* Anonymous. Caſe 191.

WELLS moved for a *mandamus* againſt *Golſon* and others, juſtices of peace of *Ipſwich*, to iſſue their precept to inquire of a force, upon affidavits of a *forcible entry*. A *mandamus* lies to juſtices to inquire of a *forcible entry*.

And it was granted.

S. C. poſt. 164.

Parkins *againſt* Woollaſton. Caſe 192.

DEBT upon a recognizance againſt bail, and plea that there was no *capias* againſt the principal: A REPLICATION averring a *capias prout patet per record'*, in the common pleas: REJOINDER, that there was a *writ of error* taken out, and allowed before the *capias* was returned and filed; and, ON DEMURRER, In debt on a recognizance againſt bail, if the defendant plead "no *capias*" againſt the principal, and the plaintiff reply "a *capias* "*prout patet per* "*recordum*," A REJOINDER that "a writ of error was allowed before the return of the *capias*," is a *departure* from the PLEA.

IT WAS ADJUDGED, that *the rejoinder* was *a departure* from *the plea*; for it is a new matter, which does not agree with or inforce the matter of the plea, for the plea is, that there was no *capias*, and the rejoinder ſays, there was *a capias*, but that it was ſuperſeded,

S. C. ante, 130. S. C. 1. Salk. 321. 1. Lev. 225. Cro. Jac. 98. Ld. Ray. 157. 342. 1097. 1177. 1259. 1452.

and

PARKINS *againſt* WOOLLASTON.

and there is a great difference between no *capias* and a *capias* ſuperſeded, for the ſuperſeding does not make it null, or no *capias*, but only ſuſpends the fruit or effect of it; and one muſt diſtinguiſh between the writ itſelf, and the effect of it. This *capias*, though ſuperſeded, is nevertheleſs a writ; and therefore if, after allowance of it, the ſheriff, before *a ſuperſedeas* ſerved upon him, execute it, the writ ſhall excuſe him, which a void writ could not do: and if the *writ of error* had been quaſhed before the return of the *capias* were out, then this writ might be well executed. And the caſe of *Vere v. Smith* (*a*) was allowed for law; it was debt upon bond to account for money; the defendant pleaded, that he did account; the plaintiff replied, that the defendant had received twenty pounds at ſuch a time, of which he gave him no account; the defendant rejoined, that he was robbed of them, whereof he gave notice to the plaintiff; and ſurely that maintains his firſt plea, for it was a legal account of them.

And by THE WHOLE COURT, judgment was given for the plaintiff.

See ante, 130.

NOTE, It ſeemed ill for another reaſon, becauſe the allowance of a writ of error before the return and filing, if it were returned before, did not obſtruct the filing.

(*a*) 2. Lev. 5.

Caſe 193.

Leonard *againſt* Stacy.

If a ſheriff, or any perſon in his aid, make *replevin* after a claim of property notified to him, he is a treſpaſſer *ab initio*.

S. C. ante, 68.
S. C. Holt, 143.
2. Roll. Abr. 561.
Lane, 90.
8. Co. 146.
2. Lev. 95.
4. Mod. 391.
Stra. 509. 1184. 1238.
Ld. Ray. 217. 509. 984. 4017.
6. Com. Dig. "Treſpaſs," (C. 2.)
2. Term Rep. 535.

TRESPASS for entering into the plaintiff's houſe, and taking away his goods: the defendant juſtifies by virtue of *a replevin* out of THE SHERIFF'S COURT in *London*, and a *precept* thereupon to *J. S.* an officer, and that the defendant came in aid of him (*b*); the plaintiff replies, that before the taking away the goods, he *claimed property* in them, and gave notice thereof to the defendant.

The queſtion, upon a ſpecial verdict, was, Whether the taking away after *claim of property*, and notice thereof, did not make him a treſpaſſer *ab initio*?

* THE WHOLE COURT held, that he was a treſpaſſer *ab initio*; for although the claim ought to be made to the ſheriff or his officer, becauſe a claimer to a perſon who comes to their aſſiſtance is not enough to make the execution illegal, if the officer do not deſiſt; yet if it be notified to him who comes in aid that a claim of property is made, he at his peril ought to deſiſt.

And by ALL THE COURT, judgment was given for the plaintiff.

(*b*) See Cameron *v.* Reynolds, that actions for breach of duty of the office of ſheriff muſt be brought againſt the *high ſheriff*, though by default of the under-ſheriff or bailiff, Cowp. 403.

Heins *againſt* Hancock. Caſe 194.

ERROR of a judgment in ejectment in *Ireland*; and it was aſſigned for error, that the denomination of one of the parcels was "*a kneave of land*," which was ſaid to be an inſenſible word; but upon certificate of THE CHIEF JUSTICE of the king's bench in *Ireland*, that it was a denomination well known there, the judgment was affirmed.

Ejectment in *Ireland* for "*a kneave of land*," is good.

Cro. Car. 179. 512. 1. Mod. 90. Hard. 57. Stra. 71. 5. Burr. 2672. 1. Burr. 623.

Anonymous. Caſe 195.

A WRIT OF PRIVILEGE was moved for to have a clergyman, who appeared to have no cure of ſouls, privileged from the office of overſeer of the poor.

A *clergyman* is exempted from ſerving the office of *overſeer*.

And though HOLT, *Chief Juſtice*, ſeemed againſt it, becauſe, by him, their privilege of exemption is only extendible to their ſpiritual revenues, and if in any caſe the privilege be perſonal, it is only from common-law offices, and ſpecially if they are without cure, as here;

Ld. Ray. 265. 2. Stra. 1107.

Yet THE OTHER THREE JUSTICES were ſtrongly againſt him: but however, for his lordſhip's ſatisfaction, they deſired that it ſhould be ſtirred again (*a*).

(*a*) DOCTOR LEE, archdeacon of *Rocheſter*, was allowed a *writ of privilege* to diſcharge him from the office of *expenditor* for *Romney Marſh*, to which he had been elected by the commiſſioners of ſewers, in reſpect of ſome land he had within the level. 1. Mod. 282. S. C. 1. Lev. 303. S. C. 1. Vent. 105. NOTE *to former edition*. Same point reſolved in the caſe of the Vicar of *Dartford*, 2. Stra. 1107. By 1. *Will. & Mary*, c. 18. ſ. 11. *diſſenting miniſters*, and by 31. *Geo.* 3. c. 32. *Roman catholic prieſts*, are, under certain conditions, exempted from ſerving the office of overſeer, and therefore a *clergyman of the church of England* may be ſuppoſed exempted; for it cannot be imagined, that the legiſlature intended to confer greater privileges on *ſectaries* than the *regular clergy* were underſtood to poſſeſs: but there does not appear to be any decided caſe preciſely to this point.

Anonymous. Caſe 196.

PER CURIAM. If a witneſs come voluntarily to give evidence without a *ſubpœna*, conſideration ſhall be had of the party's charge in maintaining him (*a*).

A witneſs though not *ſubpœna'd*, ſhall have his *expences*.

2. Stra. 1150. Dougl. 557.

(*a*) See 5. *Eliz.* c. 9. ſ. 12.

The Queen *againſt* Pugh and Others. Caſe 197.

AN INQUISITION was taken before two juſtices of the peace againſt the defendant for *a riot*, upon the ſtatute of 13. *Hen.* 4. c. 7. And the caption was, "INQUISITIO *capta*

An inquiſition for a riot need not ſpecially purſue the words of the ſtatute 13. *Hen.* 4. c. 7. but may conclude generally *contra formam ſtatuti*.—S. C. Holt, 636. Cro. Car. 564. 2. Hawk. P. C. ch. 23. ſ. 70, ch. 25 ſ. 100.

THE QUEEN *againſt* PUGH AND OTHERS.

"*pro domina regina in com. H. ſuper ſacramentum, &c. duodecim* "*proborum et legalium hominum, &c. qui adtunc et ibidem im-* "*pannelat' jurat. et triat', &c. ad inquirend' de riotis contra* "*formam ſtat',*" generally.

BROTHERICK took exception, that in the whole inquiſition there was not a word of the ſtatute of 13. *Hen.* 4. c. 7. and quoted *Crompton* (*a*), and *Lambard* (*b*), that precedents on this ſtatute * particularly deſcribe the ſtatute, and ſhew the whole proceedings of the juſtices to be preciſely purſuant to it.

* [141]

Sed non allocatur.

Juſtices of peace may inquire of riots under 13. *Hen.* 4. c. 7. and fine under 8. *Hen.* 6. c. 9.

2. Salk. 593, 594, 595.
3. Mod. 141.

For PER CURIAM, the juſtices have power to inquire of all riots and routs whatſoever by this ſtatute; and if a *forcible entry* be made by three, for fewer cannot commit *a riot*, the juſtices may inquire of it by the ſtatute of 13. *Hen.* 4. c. 7. and fine according to the ſtatute of 8. *Hen.* 6. c. 9. and award reſtitution; for a ſubſequent ſtatute that gives a greater puniſhment, does not take away the power given by a precedent ſtatute (*c*).

1. Hawk. P. C. c. 65. ſ. 39.

In what manner juſtices ſhall record a riot.

And the inquiſition may be taken any where elſe as well as upon the place; but if the information given to the juſtices be, that the riot continues, they ought to go and convict them, and record it upon *the view*, under penalty of a hundred pounds; but they may inquire, where the riot does not continue, any time within a month.

Juſtices to inquire within the month.
1. Hawk. P. C. ch. 65. ſ. 31.

But PER HOLT, *Chief Juſtice*, If they will not inquire within *the month*, they forfeit the penalty; but notwithſtanding, they may inquire after, *viz.* when they have iſſued a precept within the month to inquire.

* * * * *

Diſtinction between *a riot* and *an unlawful aſſembly.*

Skinner, 119.
Carth. 383.
2. Salk. 593. 595.
Hob. 92.
3. Burr. 1263.

And here PER CURIAM, If a number of people meet to do an unlawful act, and after they have met they do it not, that is an *unlawful aſſembly*, but not *a riot*. Alſo, If they meet to do an act that in itſelf is not lawful, but is not an act of violence or force, and they do it, that is no *riot*, but an *unlawful aſſembly*; and upon this foundation, the aſſembling in CONVENTICLES in the time of King *Charles the Second*, by the better opinion, was held no riot.

1. Hawk. P. C. ch. 65. ſ. 5. Ld. Ray. 965. 1210.

(*a*) Cromp. Juſt.
(*b*) Lamb. Juſt.
(*c*) See Rex *v.* Cator, 4. Burr. 2026. and Rex *v.* Davis, Caſes in Crown Law, 228. that a ſtatute inflicting a leſs puniſhment is a virtual repeal of a ſtatute inflicting a greater puniſhment for the ſame offence.

Caſe 198. Anonymous.

The Court will not grant an attachment in the firſt inſtance on the *affidavit* of *a reſcue*; but if the ſheriff return *a reſcue*, that is of itſelf a *conviction*, and the *attachment* will go of courſe.—Poſt. 173. 210. 3. Lev. 46. Annally, 112. 2. Salk. 586. 8. Mod. 110. 240. 342. 3. Peer Wms. 484. Ld. Ray. 589. 12. Mod. 10. 94. 247. 556. Sayer, 121. 1. Stra. 531. 624. 1226. 4. Burr. 2129. Tidd's Prac. 110.

AN AFFIDAVIT was made of *a reſcous* of one taken by *meſne proceſs*, and thereupon *an attachment* was moved for.

PER

PER CURIAM. Upon a return of *reſcous* it would go of courſe. ANONYMOUS.

But HOLT, *Chief Juſtice*, would diſtinguiſh between this and the caſe of *reſcous* upon a writ of execution (*a*), for there the ſheriff cannot return *a reſcous*, and therefore the Court can have no other ground for *an attachment* but affidavits, and ought to be contented therewith; but here *a reſcous* might be returned, which being matter of RECORD, and by conſequence a better motive, ought to be given to the Court.

Yet THE COURT ſeemed againſt him, and a rule was granted to ſhew cauſe why ATTACHMENT ſhould not go.

(*a*) Touching the difference of reſcues on *meſne proceſs*, and thoſe of perſons taken in *execution*, ſee 1. Cro. 33. 77. 175. 2. Cro. 289. 360. Pop. 189. 3. Bul. 198. Dyer, 212. 241. 3. Lev. 44. and 2. Salk. 586. Poſt. 220. See alſo Inſt. Leg. 176. 394. to 400. See alſo 1. Hawk. ch. 65. ſ. 2. 11. 18. to 23. NOTE *to the former edition.*

*[142]

* Smith *againſt* Harmon. Caſe 199.

THE plaintiff as adminiſtrator to *J. S.* ſues out a *ſcire facias* againſt the defendant's teſtator, ſetting forth, that his inteſtate ſued the defendant in this court in an action, &c. and that in that ſuit *taliter proceſſum fuit*, that he recovered damages againſt him; but that before the return of a *writ of inquiry* of damages, the inteſtate died; and that adminiſtration was committed to the now plaintiff.

If a plaintiff ſue *an executor*, and die inteſtate after *interlocutory judgment*, and before *writ of enquiry* returned, and his *adminiſtrator* ſues a *ſcire facias* on that judgment, the defendant cannot plead a *judgment recovered* againſt him in debt on bond, and that he has no aſſets *ultra*; for the ſtatute 8. and 9. *Will.* 3. c. 11. does not authoriſe a *perſonal repreſentative* to make any other defence than his teſtator or inteſtate might have made to the *writ of inquiry*. But the writ in this caſe ſhould be a SCIRE FACIAS *to bear the judgment of the Court* why the damages ſhould not be aſſeſſed.—S. C. 1. Salk. 315. S. C. Holt, 314. 1. Keb. 55. 310. 477. 2. Keb. 548. 1. Sid. 131. Raym. 16. 55. 3. Keb. 160. 1. Salk. 8. 42. Fareſt. 64, 65, &c. 1. Vern. 119. 474. Ld. Ray. 40. 263. 589. 679. 1049.

The writ commands the ſheriff to ſummon the defendant to ſhew what he can, why damages ſhould not be aſſeſſed, and judgment final for the adminiſtrator, according to the late ſtatute of 8. and 9. *Will.* 3. c. 11. being "an act for preventing frivolous "and vexatious ſuits."

The defendant is returned "ſummoned," and appears, and as to the aſſeſſing of damages, ſays nothing againſt that; but ſays, that when they are aſſeſſed, that the plaintiff ought not to recover them, for that his teſtator (for the defendant was an executor, and was ſued as ſuch) did owe ſuch a ſum by bond to *A. B.* who ſued the now defendant upon the ſaid bond, and recovered againſt him, and averred it to be a juſt debt, and that he had aſſets but to ſuch a value, which, &c.

To which plea the plaintiff demurs generally.

PENGELLY, *Serjeant*, now maintained the demurrer for two reaſons:

FIRST, This matter is not pleadable within the intent of the ſtatute, for the act never meant to give a defendant leave to plead

SMITH *againſt* HARMON.

Vide 1. Salk. 8.

any thing in bar of the original action, but only to put him in the room of the firſt defendant, or to enable ſuch a continuance of the ſuit as might have been if neither party had died, and ſaves the defendant the advantage of any error in law on the face of the former proceeding, in order to ſtay final judgment, as may appear by the very words of the act, which are: "If any plaintiff happen to "die after an interlocutory judgment, and before a final judgment "obtained therein, the ſaid action ſhall not abate by reaſon thereof, "if ſuch action might be originally proſecuted or maintained by "the executors or adminiſtrators of ſuch plaintiff. And if the de- "fendant die after ſuch interlocutory judgment, and before final "judgment therein obtained, the ſaid action ſhall not abate, if ſuch "action might be originally proſecuted or maintained againſt the "executors or adminiſtrators of ſuch defendant; and the plaintiff, "or, if he be dead after ſuch interlocutory judgment, his executors "or adminiſtrators ſhall and may have a *ſcire facias* againſt the "defendant, if living after ſuch interlocutory judgment, or if he "died after, then againſt his executors or adminiſtrators, to ſhew "cauſe why damages in ſuch action ſhould not be aſſeſſed and re- "covered by him or them; and if ſuch defendant, his executors "or adminiſtrators, ſhall appear at return of ſuch writ, and not "ſhew or alledge any matter ſufficient to *arreſt the final judgment*, "*&c.* that thereupon *a writ of inquiry* of damages ſhall be "* awarded, which being executed and returned, judgment final "ſhall be given, &c." So that the ſtatute in this caſe only calls in the firſt defendant's executor or adminiſtrator to enable him to do whatever his teſtator or inteſtate might have done, had he lived; and if he had lived, he could not have offered ſuch a plea as this; therefore the ſtatute makes uſe of the word "arreſt of judgment," which is a known term in the law: and when an act of parliament makes uſe of ſuch a term generally, it ſhall receive the ſame ſenſe that the common law takes it in, and no other (*a*). By the old books, after verdict, the defendant had a day given him to plead in arreſt of judgment; and this was done formerly, like other pleadings, *ore tenus* at the bar, but was always of ſome error appearing on the face of the record; and if at ſuch day the defendant had made default, then any body, as *amicus curiæ*, might move in arreſt of judgment ſuch matter as the party himſelf might have pleaded (*b*). It is objected, that if he cannot plead this plea, it will be of great miſchief to him, for he cannot plead this interlocutory judgment to the bond, there being nothing yet certain, and that if he cannot plead the judgment upon the bond to this, the final judgment will be a confeſſion of aſſets, and a *devaſtavit* in him. To which he gave theſe two anſwers: FIRST, that it would not be a confeſſion of aſſets; for if an executor plead "*plene adminiſtravit*,"

* [143]

Ante, 142.
1. Sid. 131.
2. Mod. 5, 6.
3. Ven. 235.
3. Keb. 477.
2. Keb. 594.
3. Keb. 160. 466.
Hob. 162.
Ante, 24.
2. Cro. 514.
2. Keb. 55. 310.
1. Leon. 263.
4. Co. 39.
Hob. 124.
1. Vent. 230.

(*a*) Hob 97.

(*b*) Vide 5. *Hen.* 7. pl. 23. a. Ro. Ab. 716. 12. *Hen.* 4. pl. 24. Raſt. Brief, a precedent of a plea in arreſt of judgment. Co. Ent. Err. 95. Vide 1. Vent. 347. which does not at all ſeem for him. Yel. 152. 1. Cro. Jac. 220. ſeems more to his purpoſe. NOTE *to former edition.*

and

and the plaintiff reply "*aſſets*," and the defendant *relictâ verificatione cognovit actionem, nec quin ipſe detinet*, this is no confeſſion of aſſets (*a*). SECONDLY, he is not privy to the firſt judgment, but it is given upon the default of his executor, and not his; and beſides, if by the ſtatute he cannot plead this plea, without queſtion the not doing of an impoſſibility will not make a man guilty of a *devaſtavit*.

SECONDLY, He argued, that the matter of the plea, in caſe the defendant might plead in bar, within the meaning of the ſtatute, was not a ſufficient bar; for the plaintiff's right now being upon record, is of a ſuperior nature to a debt by bond, and therefore debt by bond recovered ſince the interlocutory judgment is no plea to it; for, ſince the ſtatute, by the judgment the nature of the debt continues altered; but at common law, if the nature of the debt was at all altered by the interlocutory judgment, yet by the abatement of the ſuit before final judgment, it re-aſſumed its firſt nature again; but it is not ſo now ſince the ſtatute, for now the party cannot reſort to the firſt remedy by action. By DYER and MANWOOD (*b*), the award of a writ of inquiry is a kind of a judgment; and he relied much on the caſe of *Burnett v. Holden* (*c*).

None argued of the other ſide.

* HOLT, *Chief Juſtice*. This ſtatute has now eſtabliſhed the *interlocutory judgment*, and it never was the intent of it that the executor ſhould ſay more than the very party might have ſaid, and its meaning was to put the executor in the ſame condition with the teſtator; and now he pleads in bar of the original action, which lies not in his mouth to do. The next thing is, Where is there any miſchief to the executor? None at all, for judgment ſhall here be given, that the plaintiff ſhall recover *de bonis teſtatoris*, and in like manner of *coſts*; for the judgment here ſhall not be as uſually, "of coſts of goods of the teſtator *ſi ac ſi non* of the execu- "tor's goods;" but ſuch judgment ſhall be as ſhall only affect the *aſſets*, becauſe it ſhall be juſt as if *judgment final* had been againſt the teſtator in his life-time. Then if he be excluded from pleading in this caſe, he does not admit *aſſets*, ſo he is as much at large as if the judgment had been actually compleated in the teſtator's life (*d*); and ſurely the debt, the right whereof now appears on record, is of a higher nature than debt upon a bond, though the *quantum* of it be not aſcertained. If an *indebitatus* be brought againſt an executor, and he plead that his teſtator did covenant ſeveral things, and that the covenant was broke, and that the damages thereof amount to ſo much, and ſhews that he has no more aſſets, it will be a good plea, though the damages be not certain any more than here. If an executor voluntarily pay a

* [144]

(*a*) Hob. 178. 1. Roll. Abr. 929. pl. 3.
(*b*) 3. Leon. 68.
(*c*) 1. Lev. 277. Raym. 210.
(*d*) See Hawkes v. Saunders, Cowp. 293.

SMITH *againſt* HARMON.

1. Leon. 44.
2. Keb. 223.
1. Lev. 165.
3. Lev. 114.
2. Vern. 117. 299.
Prec. Chan. 188. 534.
10. Mod. 428. 495.
12. Mod. 291.
Ld. Ray. 1320.
Fitzg. 77.
2. Peer Wms. 296. 447.
3. Peer Wms. 117. 330. 400.
Caſes T.T. 217.

ſtatute, before *a judgment* had againſt his teſtator, it is *a devaſtavit*; but if, after death of the teſtator, execution be taken out and executed, he may plead it to a *ſcire facias* upon the judgment, becauſe he could not hinder execution; and that is *And.* 208, 209. And he put the caſe of *Burnet v. Holden* (*a*), A teſtator had judgment againſt him upon *aſſumpſit*, and *ſcire facias* againſt executor thereupon; he pleads a verdict againſt his teſtator in his life-time, and judgment againſt him as executor upon 17. *Car.* 2. c. 8. and payment thereof; and it was held a good plea, and that now the judgment was to be conſidered as given againſt the teſtator himſelf: and HALE, *Chief Juſtice*, there ſaid, that if the judgment had been at common law againſt the teſtator himſelf, after his death it had been well pleadable by the executor until reverſed, for the executor could not falſify it in pleading.

And POWELL, *Juſtice*, agreeing *in omnibus*, put this caſe in account. The judgment is, that the defendant account; a *ſcire facias* lay for the executor before this ſtatute; yet the party could plead nothing againſt the firſt judgment.

HOLT, *Chief Juſtice*. This *ſcire facias* is not ſo good as it ſhould be, for it ſhould be *ſcire facias ad audiendum judicium*, that is, giving them day to come and hear judgment of the Court.

* [145]

* And at another day, none appearing for the defendant, PER TOTAM CURIAM, the plaintiff had judgment *niſi* in three days, and the rule was afterwards made abſolute;

Ante, 143, 144.
3. Lev. 114, 115.
1. Mod. 179.
Vaugh. 94.

HOLT, *Chief Juſtice*, declaring, that the ſecond point was not in queſtion here, but that they were very clear upon the firſt; and that the executor could not plead *a releaſe* here though to himſelf, and therefore the not pleading of it would not be a *devaſtavit*.

(*a*) 1. Lev. 277. 1. Mod. 6. Raym. 210.

Caſe 200.

Anonymous.

Gaol delivery of *Middleſex*, how held in *London*.

HOLT, *Chief Juſtice*. The *gaol delivery* of *Middleſex* is held within the city of *London* by preſcription, but the *oyer* and *terminer* is not ſo, but at *Hicks's Hall* in the county of *Middleſex*; ſo that though of common right the *gaol delivery* ought to be within the proper county, yet cuſtom and uſage, time out of mind, may make it otherwiſe.

Caſe 201.

Anonymous.

Collectors of taxes cannot compel perſons to come before them to pay.

HOLT, *Chief Juſtice*. Commiſſioners to aſſeſs taxes cannot compel the inhabitants to come before them out of the country; but if they will come voluntarily, it will be well.

Ano-

Anonymous.

Caſe 202.

AN ordinary commits adminiſtration out of his dioceſe or province: an ordinary of *Ireland* may commit adminiſtration here in *England* of goods within his dioceſe.

An ordinary of *Ireland* may grant adminiſtration of goods in *England*.—Ld. Ray. 562. 856.

The Queen *againſt* Leech.

Caſe 203.

LEECH was indicted for a publick nuiſance to *Billingſgate-Dock*.

The indictment ſet forth, that *Billingſgate-Dock* was a common dock, to which all ſmall ſhips coming with proviſion to the markets of *London* might come, but that no great ſhip ought or uſed to come there; that, notwithſtanding, the defendant brought a great ſhip of three hundred ton into it, *ad commune nocumentum* of all the queen's ſubjects, &c.

If a man bring a large ſhip of three hundred tons into *Billingſgate Dock*, he may be indicted for a public nuiſance to the dock.

1. Hawk. ch. 75. 2. Hawk. ch. 10. ſec. 59. and ch. 25. ſec. 35. 61. 12. Mod. 342. 510. 519. 626. 635. 640.

It was excepted, on motion for quaſhing of this indictment, that it was inconſiſtent to ſay that a place is *a common dock*, and that it would be *a nuiſance* for a great ſhip to come there; for a common dock in its nature is free for all ſhips.

But PER CURIAM, Why may there not be *a common dock* only for ſmall ſhips, as well as a *common pack* and *horſe way*; and if a man with a cart uſe ſuch a way, ſo as to plow it, and render it leſs convenient for riders, will not that be a nuiſance indictable? Beſides, we never quaſh indictments for nuiſances. But if a nuiſance be removed, and the party confeſs it, it will be a great mitigation of the fine, that is, the removal will; and it may, in that caſe, be proper to offer affidavits to leſſen the offence to the Court, but not otherwiſe.

And they put the defendant to demur, which he did; *quod nota*.

* Williams *againſt* Jackſon.

Caſe 204.

UPON a point, what notice ſhould be given to defendants of trials, and of executing of *writs of inquiry*, theſe points were agreed by the Court:

What *notice* ought to be given of executing *writs of inquiry*. 1. Keb. 112. 1. Sid. 34. 231. 2. Lilly, 151. 356.

FIRST, That convenient notice was as much neceſſary, and fit to be given, of the executing of *a writ of inquiry*, as of *a trial (a)*.

2. Salk. 465. 650. Inſt. Leg. 64. 143, 4. 293, &c. 8. Mod. 366. Comy. Rep. 35. 11. Mod. 237. 12. Mod. 435. 525. 1. Barnes, 84. 205. 223. 289. 302. 2. Barnes, 203. 237. Ld. Ray. 3382. 5. Com. Dig. "Pleader" (Z. 2.). Impey, 400.

(*a*) Therefore where a Term's notice of *trial* is required, there muſt, at the ſame diſtance of time, be like notice of executing a *writ of inquiry*, Peyton *v.* Burdus, Stra. 1100. And a Term's notice muſt be given in all caſes where the proceedings have been delayed, except by *injunction* out of chancery, for four Terms. Rule Mich. Term, 4. *Ann.*

WILLIAMS *againſt* JACKSON.

SECONDLY, That by a late rule of Court, if a *writ of inquiry* or iſſue be to be tried in *London* or *Middleſex*, and the defendant live not above forty miles off, eight days notice will ſuffice; but if it be above forty miles off, there ought to be fourteen days notice in either caſe.

THIRDLY, That the reaſon is the ſame in all other caſes, where the parties are above forty miles diſtant from the place where the trial is to be, though they be country cauſes: yet becauſe it is an ancient rule, that *eight days notice* ſhould be ſufficient in all *country cauſes*, and that had been done in the caſe now in queſtion, it being a country cauſe, the execution of the *writ of inquiry* ſtood.

And THE COURT ſaid, They would conſider of altering the rule *(a)*.

Why *fifteen days* between *teſte* and *return* of proceſs.

And PER CURIAM, The reaſon why by common law there are fifteen days between the *teſte* and the return of proceſs, is, becauſe that was thought a ſufficient time to come from any part of the kingdom to another, for at twenty miles a-day a man in fifteen days will go all over the land.

2. Salk. 599. 602. Cro. Eliz. 738. 8. Mod. 31. 305. 10. Mod. 82. 11. Mod. 255. 12. Mod. 524. Skin. 633. 4. Bac. Abr. 422. 2. Bl. Rep. 922. Stra. 811. 2. Ld. Ray. 1528. 6. Com. Dig. "Proceſs" (B.) Stra. 765. 917.

(*a*) It does not appear that the rule has been altered. Impey's Pract. 5. edit. 400. Cromp. Pract. 285. Barnes, 203.

Caſe 205.

Sparks *againſt* Wood.

Pleas to the juriſdiction as well of inferior as ſuperior courts muſt be verified *on oath*, and tendered *in perſon* while the Court is ſitting.

DEBT was brought in *London*: A prohibition was moved for, and ruled *niſi*, upon ſuggeſtion that the defendant had tendered for plea below, that the cauſe aroſe out of their juriſdiction, and offered to make oath of the truth of his plea.

Now, it was ſhewed, that he tendered the plea after the Court was up, whereas it ſhould be *in propriâ perſonâ*, and in court: and though an affidavit was offered here of the truth of the plea, and one *Turner's Caſe* quoted out of *Lutwyche (b)*, where a prohibition had been granted upon ſuch an affidavit here above without oath of it below;

S. C. 3. Salk. 173. 1. Vent. 88. 281. 333. Raym. 189. 1. Mod. 63. 1. Sid. 464. 2. Mod. 197. 2. Inſt. 230. 1. Bac. Abr. 563.

Yet by POWELL, POWYS, and GOULD, *Juſtice*, *abſente* HOLT, *Chief Juſtice*, the rule was diſcharged; for in all pleas that ouſt a court of juriſdiction, whether inferior or ſuperior, there muſt be oath in that very court of the truth of the plea *(c)*.

Quære, if they refuſe the oaths.

(*b*) 2. Lutw. 1023.

(*c*) See 4. and 5 *Ann.* c. 16. and Mr. Gwillim's Edition of Bacon's Abr. vol. i. 26.

* Cragg *againſt* Bowman. Caſe 206.

At NISI PRIUS, *before* TREVOR, *Chief Juſtice of the* Common-Pleas.

A FEME COVERT had parted from her huſband by conſent, who allowed her *ſeparate maintenance*. She came from *Beverley* in *Yorkſhire*, where the huſband lived, to *London*; where, living in *adultery*, ſome four years after ſhe became big with child, and in that condition came to lodge with the plaintiff, who did not fully appear to have known any thing of the matter, and lodged and boarded with him for nigh a twelve-month: he was likewiſe at the charge of her lying-in.

If a *feme covert*, after parting by conſent, and receiving a *ſeparate maintenance*, commit *adultery*, her huſband ſhall not be liable to her debts. Ante, 105. Poſt. 162, &c. 171. 1. Salk. 113. 116. 119. 1. Keb. 96. 337. 482. 1. Mod. 124. 1. Sid. 127. 425. acc. 2. Sid. 209. 1. Lev. 4. 2. Vern. 386. 493. 671. 752. Prec. Chan. 502. 239. 496. 11. Mod. 241. 12. Mod. 244. 2. Bl. Rep. 1197.

Now the action was brought againſt the huſband for this debt; and all this matter appeared on evidence.

THE CHIEF JUSTICE ordered the plaintiff to be *called*; for he ſaid, that though the huſband be bound to pay the wife's debts for her reaſonable proviſion, yet if ſhe part from him, eſpecially by reaſon of her miſbehaviour, as here it muſt be preſumed ſhe did, ſhe living in *adultery* after the ſeparation, and he allows her *a maintenance*, he ſhall never after be charged with her debts, until a new cohabitation.

NOTE, Here the woman lived very decently and modeſtly all the while ſhe was in the plaintiff's houſe; and alſo it was proved, that her maintenance was duly paid to her (*a*).

276. 372. Ld. Ray. 444. 1006. Stra. 127. 647. 706. 875. 1122. 1214.

(*a*) See the caſe of Robinſon v. Goſnold, poſt. 171. Sparrow v. Caruthers, 2. Bl. Rep. 197. Hatchett v. Baddeley, 2. Bl. Rep. Ringſtead v. Lanceſborough, Co. B. L. 32. Barwell v. Brooks, Cook B. L. 36. Corbet v. Polnitz, 1. Term Rep. 5.

Popley *againſt* Aſhly. Caſe 207.

THE defendant being a captain of a ſhip, took ſeveral goods for the uſe of the ſhip from the plaintiff, who ſent his ſervant with a bill to him for his money. The defendant orders the ſervant to write him a receipt for the money, which he did, and thereupon he gives him a note upon a third perſon, payable in two months. The maſter ſent ſeveral times to the third perſon, to preſent him the note, but could not get ſight of him within the time at which the money was payable: the party breaks.

A draft on a third perſon given by a vendee to a vendor in payment, will not diſcharge the debt, if the drawee is not to be found, and the holder uſe due but ineffectual diligence to get it paid. S. C. Holt, 121. Poſt. 301.

This action was now brought for the money againſt the captain; and all this appearing on evidence, and that the captain went to ſea next day after he gave the note,

Gilb. E. R. 155. 10. Mod. 109. 12. Mod. 241. 408. 517. Stra. 415. 508. 550. 707. 910. 1175. 1195. 1248.

HOLT,

POPLEY *againſt* ASHLY.

HOLT, *Chief Juſtice*, directed for the plaintiff. And he ſaid, that if a man give a note upon a third perſon in payment, and the other take it abſolutely as payment (*a*), yet if the drawer knew the third perſon to be breaking, or in a failing condition, and the receiver of the note uſes all reaſonable diligence to get payment, but cannot, this is a fraud, and therefore no payment; and here was no laches in the plaintiff; for the party failed before the money was payable, and the captain was gone to ſea, ſo he could not bring him back to him to give him notice: but if a man
* [148] * take a note, and after it is payable makes no demand, and that he might be paid if he had been diligent enough, there if the party, on whom the note is, fails, it is at his peril that took the note (*b*).

(*a*) See Clarke *v.* Mundal, 1. Salk. 124. 3. Salk. 68.

(*b*) By 3. and 4. *Ann.* c. 9. ſ. 7. "If any perſon accept a bill of exchange "for and in ſatisfaction of any *former* "*debt*, or ſum of money formerly due to "him, this ſhall be accounted and eſ- "teemed a full and compleat payment "of ſuch debt, if ſuch perſon, accept- "ing of any ſuch bill for his debt, do not "take his due courſe to obtain payment "of it, by endeavouring to get the ſame "accepted and paid, &c." The due courſe is to demand payment at the time the bill becomes due, or to give notice within a reaſonable time to the parties to whom he means to reſort for payment, of its not being paid. What ſhall be a reaſonable time was formerly conſidered as a matter of fact for the opinions of the jury under all the circumſtances of each caſe, Hankey *v.* Trottman, 1. Black. Rep. 1. but it is at length ſettled that this is a queſtion of law for the deciſion of the Court, Tindal *v.* Brown, 1. Term Rep. 167. And as to what has been conſidered *reaſonable time* upon this ſubject, ſee Taſſell *v.* Lewis, 1. Ld. Ray. 744. Bleſaid *v.* Hurſt, 5. Burr. 2670. Goodall *v.* Dolly, 1. Term Rep. 712. Coleman *v.* Sayer, 2. Stra. 829. Dagliſh *v.* Weatherby, 2. Bl. Rep. 747. Tindal *v.* Brown, 1. Term Rep. 170. Metcalf *v.* Hale, cited Dougl. 515. 1. Term Rep. 171.

Caſe 208.

Graves *againſt* Blanchett.

An action will not lie at common-law for calling an unmarried woman *a whore*, and therefore, if to ſuch a charge in a declaration other words which *are actionable* be joined, and *entire damages* given, the judgment ſhall be arreſted, although the ſecond count alledges *ſpecial damage*.

AN action on the caſe for words: The plaintiff declared for words ſpoke at ſeveral times.

The firſt were, "She is a whore, and has had a baſtard by her "father's apprentice;" alledging *a colloquium*: The other, "Thou "art *a whore*, and hadſt *a baſtard* by your father's apprentice;" *quorum quidem aliorum verborum prapalatione*, &c. ſuch a one who courted her for a wife, and was ready to marry her, fell off: There was a verdict for the plaintiff, and intire damages.

IT WAS MOVED *in arreſt of judgment*, that the firſt words were not actionable, the ſpecial damages being tied up to the latter words by the word *aliorum*.

And PER CURIAM, If it were *res nova*, it were reaſonable to make the firſt words actionable, for no greater misfortune can befall a young woman, whoſe well-doing depends upon her having a good huſband, than to be reputed *a whore*; but the authorities are too many and great to run counter to them; and the reaſon of them is, that fornication is a ſpiritual offence, not puniſhable at

S. C. 2. Salk. 696.

Ante, 1. Vent. 4. 1. Sid. 396. Hob. 296. Carth. 498. 10. Mod. 385. 12. Mod. 597. 633. Stra. 666. 936. 946. 471. 545. Ld. Ray. 710. 1004. 1007.

common

common law; and an action ſhall not lie for charging one with an offence of which the law takes no notice, without *ſpecial damages* (*a*); and if *Anne Davis's Caſe* (*b*) had been purſued, as it has been contradicted, it would do: There was a time when *hereticks* were put to death, yet it never was actionable to call a man *a heretick* (*c*).

GRAVES *againſt* BLANCHETT.

And the judgment arreſted, VIZ. *quod quer' nihil' cap', &c.*

(*a*) See Salter v. Browne, Cro. Car. 436.
(*b*)
(*c*) See 1. Com. Dig. "Action of Defamation" (F.)

Harvey *againſt* Broad.

Caſe 209.

JUDGMENT was given by default in the common-pleas, and a *writ of error* of it there. Upon the general error aſſigned, it was ſhewed, that the *writ of inquiry* was returnable *Tres Trinitatis*, which in fact happened to be *Sunday* the fourteenth of *June*.

If a writ be returned as executed on the fourteenth of June *laſt paſt*, it ſhall refer to *the day* and not to *the year*. S. C. poſt. 159. 196. S. C. 2. Salk. 626. S. C. Holt, 76. Poſt. 250. 252.

The writ was returned executed the fourteenth of *June ult. præterit'*, which muſt be a year before.

PER CURIAM. A writ of inquiry may be executed on the day on which it is returnable, and the *ult' præterit'* is but a miſtake, the return being made after the fourteenth day; and the *ult' præterit'* was intended to go to *the day*, and not to *the year*, and therefore you may amend it in common-pleas.

But what is fatal is, that *Tres Trinitatis* is the *Sunday*, and right *eſſoin-day* of the Term; and though the eſſoins be kept on *Monday*, yet a writ returnable *Tres Trinitatis*, when that falls on a *Sunday*, though the return be kept on the next day, cannot be executed on the next day.

If a *writ of enquiry* be returnable on *a Sunday*, it is void. 11. Mod. 120. Stra. 811. Ld. Ray. 1557. Sellon's Pract. 13.

And therefore the judgment was reverſed *niſi* (*a*).

(*a*) See the Caſe of Davy v. Slater, 1595. 1. Bl. Rep. 496. 526. poſt 250. Swan v. Browne, 3. Burr.

* Cole *againſt* Turner.

* [149]

Before HOLT, *Chief Juſtice, at* NISI PRIUS.

Caſe 210.

HOLT, *Chief Juſtice*, upon evidence in treſpaſs for aſſault and battery, declared,

To touch another in anger, though in the ſlighteſt degree, or under pretence of paſſing, is, in law, a *battery*. S. C. Holt, 108. Poſt. 172.

FIRST, That the leaſt touching of another in anger is a battery.

SECONDLY, If two or more meet in a narrow paſſage, and without any violence or deſign of harm, the one touches the other gently, it will be no battery.

2. Roll. Rep. 545. Carth. 480. 491. 1. Mod. 3. Jones, 444. Ld. Ray. 62. 231. 2. Com. Dig. "Battery" (A.). 1. Hawk. P. C. ch. 62. ſ. 2. 1. Bac. Abr. 154.

THIRDLY,

Cole *againſt* Turner.

THIRDLY, If any of them uſe violence againſt the other, to force his way in a rude inordinate manner, it will be a battery; or any ſtruggle about the paſſage to that degree as may do hurt, will be a battery (*a*).

An action by huſband and wife for a battery on *both*, concluding *ad damnum ipſorum*, is bad.

Ante, 127.

NOTE, It was in action of battery by huſband and wife, for a battery upon the huſband and wife, *ad damnum ipſorum*; and though the plaintiff had a verdict, yet THE CHIEF JUSTICE ſaid, he ſhould never have judgment.

And the judgment was after arreſted above upon that exception.

(*a*) See Year Books 7. *Edw.* 4. pl. 26. and Bro. Abr. "Treſpaſs" 236. 336. the 3. *Hen.* 4. pl. 9. the 22. Aſſize, pl. 60.

Caſe 211.

Turner *againſt* Nurſe.

An *order* or *bare commiſſion* of chancery is no evidence.
Poſt. 225.
1. Salk. 278. 281. 286. 555. 690.
7. Mod. 129. 141. 8. Mod. 75. 181. 322. 9. Mod. 66. 11. Mod. 210. 12. Mod. 136. 231. 1. Vern. 413. 331. Gilb. E. R. 16. Fitzg. 197. Stra. 162. 481. 545. 920. Ld. Ray. 220. 311. 388. 473. 501. 730. 893. 1073. 1166. 1292.

AN ORDER of the court of chancery is not to be given in evidence, without producing a copy of the bill on which it was made (*b*); yet a commiſſion out of chancery to abut and bound certain land, returned and acquieſced under, and an enjoyment accordingly, is good evidence of the land ſo bounded being rightly bounded; but a bare commiſſion returned without more, is no evidence at all.

(*b*) In an action upon a wager, whether a decree of the court of chancery would be reverſed on appeal to the houſe of lords, *a copy* of the reverſal is ſufficient evidence without producing the *minute-book* itſelf, and ſuch copy need not be on ſtamps, Jones *v.* Randall, Cowp. 17.

Caſe 212.

Anonymous.

The grantee of wreck has, of neceſſity, a right of way to it, over the land of another.
Ante, 3.
Poſt. 163.
1. Ro. Ab. 60.
Noy, 9.
1. Wilſ. 114.
3. Com. Dig. 58.

PER CURIAM. FIRST, If a man, either by grant or preſcription, have a right to wreck thrown upon another's land, of neceſſary conſequence he has a right to a way over the ſame land to take it.

SECONDLY, The very poſſeſſion of the wreck is in him that has ſuch right before any ſeizure.

Originally all wrecks were in THE CROWN, and the king has a right to way over any man's ground for his wreck; and the ſame privilege goes to grantee thereof.

Hale *againſt* Clare. Caſe 213.

A WRIT OF ERROR of a judgment in *the palace-court*, and a variance between *the plaint* and *the declaration*, VIZ. that the plaint was entered at the ſuit of *C. F.* generally, and the declaration was *C. F.* executor, &c.; ſo that the plaint was in his own right, and the declaration as executor. This was aſſigned for error.

If *a plaint* in an inferior court be at the ſuit of *C. F.* generally, and *the declaration* be at the ſuit of *C. F. executor*, the *variance*, though fatal before, is cured after verdict.

* PER CURIAM. If this variance had been in a record certified from the court of common-pleas, between *the original* and *the declaration*, where the original is only by way of recital, the party might alledge *diminution*, and have the right original if any certified; but the difference is between inferior and ſuperior courts, for no *diminution* can be alledged of a record removed out of an inferior court, but the Court muſt take it as they find it at firſt; and this variance is fatal. The want of *a plaint* in an inferior court, is like the want of *an original* in a ſuperior court, and therefore curable by verdict (*a*). So, if there had been a verdict in this caſe, the queſtion would be, Whether we would not look upon *a plaint* in another action to amount to the want of a plaint, and ſo aid it by the verdict (*b*). But it being not after verdict, that matter falls not under conſideration.

* [150]

S. C. 1. Salk. 266. Poſt. 181. 7. Mod. 103. Hob. 130. 135. 264. 282. Cro. Car. 282. 1. Jones, 304.

By THE WHOLE COURT the judgment was reverſed.

(*a*) See 18. *Eliz.* c. 14. and Parker *v.* Grigſon, Cro. Car. 282.
(*b*) See Wilſon's Caſe, Hob. 130. Willis *v.* Wgodhouſe, Hob. 264. accordant. But Prat *v.* Dixon, Cro. Jac. 108. contra.

White *againſt* Bodinam. Caſe 214.

LESSEE for years brings covenant againſt the leſſor, declaring upon a demiſe and covenant for *quiet enjoyment*, and aſſigns for breach, that the leſſor entered upon him, and ouſted him of the premiſes.

In covenant for quietenjoyment, the defendant may plead that he entered "to "diſtrain, *abſque hoc* that "he ouſted "him of *the* "*premiſes*" without ſaying "*or any part* "*thereof.*"

The defendant pleads, that he entered to *diſtrain for rent arrear*, ABSQUE HOC that he ouſted him *de præmiſſis*.

To which the plaintiff demurs, thinking *the traverſe* ill; becauſe if he had ouſted him of any parcel of the premiſes, he had a good cauſe of action; therefore he ſhould have traverſed, ABSQUE HOC that he ouſted him of the premiſes, or any part thereof.

But PER CURIAM, The plea is well enough in this caſe; for if the plaintiff join iſſue upon the matter of *the traverſe*, and prove *ouſter* of any part, the iſſue will be for him.

S. C. 2. Salk. 629. Carth. 205. 177. 183. 290. 519. Vaugh. 175. 272. Lat. 105.

2. Co. 1. 8. Co. 91. 3. Cro. 914. 2. Saund. 177. Yel. 30. 1. Vent. 1. Lut. 317. 323. 1. Inſt. 282. Hob. 53. 8. Mod. 318. Comy. 230.

And

WHITE *againſt* BODINAM.

And THE COURT took a diverſity between pleading the *general iſſue*, as in debt you muſt plead, *non debet nec aliquam inde parcellam*, and a *ſpecial iſſue* as this is. See the caſe of *Robſert v. Andrews (a)*, and the caſe of *Teril v. Dune (b)*.

And JUDGMENT was given for the defendant.

(a) Cro. Eliz. 84. the ſixth error aſſigned.

(b) Dyer's Rep. 115. b.

Caſe 215. The Queen *againſt* The Ducheſs of Buccleugh.

If a manor be held by tenure of repairing a highway, the alienee of any part of ſuch manor is liable to the whole charge.

A TRIAL AT BAR upon an *information* againſt the *Ducheſs of Buccleugh*, *Sir John Bucknall*, *Lady Anne Franklin*, and others, tenants of lands, now or heretofore part of the manor of *Delemore* in *Hertfordſhire*, for ſuffering a *common bridge* to be ruinous, and out of repair.

Theſe points were reſolved by THE WHOLE COURT.

S. C. 7. Mod. 54. 98. S. C. 1. Salk. 358. * [151] S. C. Holt, 128. S. C. 2. Ld. Ray. 792. 804. ch. 77. ſ. 1.

FIRST, If a manor be holden by the ſervice or tenure of repairing a bridge, highway, &c. and part of it be afterwards ſevered from the manor, yet the charge or ſervice ſhall run with it; and every one of * the alienees, of ever ſo ſmall a matter or parcel of the *demeſnes* or ſervices, is anſwerable to the publick for the whole, and are contributory among themſelves.

Poſt. 191. 255. 307. 8. Mod. 119. 12. Mod. 13. 198. 409. 1. Hawk. P. C. Ld. Ray. 856. 1175. 1249. Stra. 180. 900. Salk. 356. 359.

The alienee of a manor by *knight-ſervice* ſhall hold by the ſame tenure.

SECONDLY, If a manor be holden of the king by *knight's-ſervice*, and the lord ſince or before the ſtatute of *quia emptores* alien part of the demeſnes, the alienee ſhall hold by *knight's-ſervice*.

The alienee of a manor charged with an annuity ſhall hold it ſo charged.

THIRDLY, If the lord of a manor grant a rent-charge thereout, and alien part of the *demeſnes*, the alienee ſhall hold it charged with the rent.

The lord of a manor may diſcharge the vendee of it from repairs.

FOURTHLY, Upon alienations, or ſeverance of parcel of the manor, the lord may agree to diſcharge the land of the repairs; but that only binds himſelf, and ſuch as claim under him, and not the publick.

A manor cannot be ſevered.

FIFTHLY, A manor is an entire thing, and not ſeverable.

Land ſevered from a manor cannot be re-annexed to it. 1. Salk 186, 187.

SIXTHLY, Lands once ſevered from a manor, can never after become parcel of it in reality, but it may in reputation; as if lands, part of a manor, be aliened away abſolutely, and re-purchaſed, and an unity of poſſeſſion for a conſiderable time after.

SEVENTHLY,

SEVENTHLY, Here a park was parcel of a manor, which none can have but by grant or preſcription.

A park muſt be by grant or preſcription. Mar. 201. 224.

NOTE, This whole manor was ſeveral times in THE CROWN as part of the *Duchy of Lancaſter* (*a*).

The manor of *Le More* was part of the *Duchy of Lancaſter*.

(*a*) The defendant was *convicted*, S. C. 2. Ld. Ray. 792. but it was afterwards moved in arreſt of judgment, that the information only alledged that the defendant "*Sir John Bucknal* ought to repair "the bridge, for that he now is, and for "ſeveral years laſt paſt was, lord of the "manor, &c." and did not ſhew that he was liable to repair the bridge, by reaſon of *tenure*, or by *preſcription*. And THE WHOLE COURT were of opinion, that the county was of common right bound to repair all public bridges; that the defendant's being lord of the manor was no reaſon that he ſhould repair the bridge, and that ſome particular charge, as *rationæ tenuræ*, or by *preſcription*, ought to have been ſhewn. And on this objection the judgment was arreſted. S. C. 2. Ld. Ray. 804. S. C. 7. Mod. 55. See alſo Reg. v. Watſon, 2. Ld. Ray. 856.

EASTER TERM,

The Third of Queen Anne,

AT

The Sittings

BEFORE

Sir John Holt, *Knt. Chief Juſtice*

OF

THE COURT OF QUEEN'S BENCH.

Clark *againſt* Dealy. Caſe 216.

THE PLAINTIFF as executor brought *indebitatus* for money of the teſtator received after his death to the plaintiff's uſe, and produced the teſtator's debtor, who paid it, as a witneſs: but he was rejected.

In an action by an executor againſt a perſon who had *received* money due to the teſtator, the *original debtor* is not a competent witneſs to prove the payment of the money. S. C Holt, 756. 1. Salk. 27, 28, 283. 285, 286, 287.

HOLT, *Chief Juſtice.* The plaintiff, by bringing this action, determines the election which he had of ſuing the original debtor, or the receiver, and allows of the payment; but if he be *non-ſuited*, the matter is at large again, and he may ſue the debtor, and therefore the debtor ſwears to diſcharge himſelf, and by conſequence is no witneſs (*a*).

IT APPEARED ALSO, that another ſum of money mentioned in the declaration, was found by the defendant in the teſtator's room after his death, which he took.

Trover and not *aſſumpſit* lies by an executor for *money* taken out of teſtator's room after his death.

And PER HOLT, *Chief Juſtice*, As to that, the plaintiff miſtook his action; for he ſhould have brought *trover*, and not an *indebitatus* for money received to his uſe.

And the plaintiff was non-ſuited.

(*a*) But he may be rendered a competent witneſs by a *releaſe* of the debt. Clarke v. Shee, Cowp. 199.

Case 217. * The Queen *against* Chapman, late Mayor of Bath.

A copy from *the crown-office* of the writ and return to a *mandamus* is sufficient evidence against the party on an information for *a false return.*

2. Salk. 428, 429, 430, 431. 1. Salk. 77, 78. Post. 309. Carth. 170. 293. Skin. 293. 310. 368. Q. 2. Hawk. ch. 10. sec. 47. S. C. Holt, 442. Ld. Ray. 126. 564. 840. 885. 12. Mod. 126. 308. 322. 408.

AN INFORMATION was granted against *Chapman* for making a *false return* to *a mandamus*, commanding him to proceed to the election of A TOWN-CLERK for the corporation, in the room of one *Bushell.*

To which he returned, that before the arrival of the writ, *John Smith* had been duly chosen, and sworn into the said office.

It appeared on evidence, that the right of election was in thirty common-council men; that *the mayor*, at such a time, before the arrival of the writ, had summoned them to meet in order to the election; that twenty-eight met; that three candidates were set up; that two of the twenty-eight voted for one; that thirteen voted for another; and that the mayor and twelve more voted for the third; that the mayor, pretending to have a casting voice, declared his man duly elected; and, at another court, swore him in.

And the following points were in this case ruled by HOLT, *Chief Justice*, at NISI PRIUS.

FIRST, That there needs no more evidence to prove this return to be the mayor's, but the copy of the writ and return thereof in THE CROWN-OFFICE.

A false return by a *majority* shall be intended the *mayor's* unless he disavow it.

SECONDLY, That though, upon the consultation, the majority be against him, and make a return in his name, yet it shall be taken to be his if he do not come and disavow it.

Cowp. 538. 1. Salk. 431. 701.

The delivery of the writ to the mayor need not be proved.

THIRDLY, That it is not necessary to prove a delivery of the writ to THE MAYOR, no more than to a sheriff in a *false return* against him (*a*).

A *mandamus* to a corporation must be returned to the mayor.

FOURTHLY, That, notwithstanding, the writ is to be delivered to THE MAYOR, as the most visible part of the corporation.

Action for a false return may be against *the corporation* or any *member* of it.

FIFTHLY, That this action for a false return may be brought against the whole corporation, or against any particular member of it.

The mayor of common right has not a casting voice.

7. Mod. 12.

SIXTHLY, That THE MAYOR or other head-officer, of common right, has not a casting voice; but that such a thing may be by particular constitution, as by *prescription* or by *charter.*

12. Mod. 232. 1. Stra. 53. 10. Mod. 56. 5. Mod. 404. 421.

(*a*) So in an action of debt against a sheriff for permitting an escape, the indorsement of *non est inventus* upon the *capias ad satisfaciendum* is sufficient evidence of its having been delivered to him: so the bailiff's name indorsed on the writ is sufficient evidence that he was authorized by the sheriff, without proving the warrant. Blatch *v.* Archer, Cowper, 63.

SEVENTHLY,

SEVENTHLY, If there be an equality of votes, and therefore they cannot chooſe, upon *mandamus* they muſt agree, or elſe they ſhall be all brought up as in *contempt*, and laid by the heels until they do agree; for although after a jury is ſworn, they ſhall be impounded until they *all* agree, yet here it ſuffices that *a majority* do agree.

On a *mandamus* to elect a *town-clerk*, they cannot return that there was an *equality of votes*.

10. Mod. 75.
12. Mod. 232.
2. Burr. 798. to 429.

And THE MAYOR was found guilty.

1019. Cowp. 249. 538. 4. Term Rep. 810. Kyd on Corporations, 1. vol. 401.

* Dove *againſt* Smith.

*[153]
Caſe 218.

IN TRESPASS for breaking the plaintiff's cloſe, and treading his graſs,

In treſpaſs, the *value* of the damages muſt be *ſtated* and *proved*.
Ante, 38. 105.
Cro. Jac. 297.
2. Mod. 253.
5. Mod. 178.
2. Lev. 430.
4. Burr. 2455.
S. C. Clift. 713.
S. C. Holt, 194.

It appeared on evidence, that the plaintiff had a cloſe adjoining to the back part of the defendant's houſe, which was a publick-houſe; that the defendant ſometimes uſed to ſet a table for his gueſts in the ſaid cloſe, and ſerve them there; and that he often uſed to walk there for his pleaſure, and with others, who ſhot with bows and arrows there.

HOLT, *Chief Juſtice.* You muſt give evidence of the value of the damages done, or you cannot recover, for the law goes by evidence.

And if in this caſe the jury give under forty ſhillings damages, though the title of the land do not come in queſtion, yet will I certify for *coſts*, for this is a voluntary malicious treſpaſs, and the ſtatute is only to be underſtood of ſmall accidental treſpaſſes (*a*).

The ſtatute 8. & 9. *Will.* 3. c. 11. only excludes accidental treſpaſſes from *full coſts*. Lutw. 1301. 1304. &c.

And here it being upon a *not guilty*, they could not give any matter of right in evidence, not even in mitigation of damages.

In treſpaſs, the *right* cannot be given in evidence on *not guilty*.

(*a*) By 22. and 23. *Car.* 2. c. 9. "In "treſpaſs and other actions perſonal, if "the jury find under forty ſhillings damages, the plaintiff ſhall have no more "coſts than damages, unleſs the Judge "ſhall certify that the *freehold* or *title* to "the land came principally into queſtion." See Moor *v.* Hale, Bull. N. P. 329. Beale *v.* Moor, 2. Stra. 1168. Blunt *v.* Miller, 1. Stra. 645. Lord Dacre *v.* Tibb, 2. Bl. Rep. 1151. Clegg *v.* Molyneux, Dougl. 750. And by 8. and 9. *Will.* 3. c. 11. "In all actions "of treſpaſs in which the Judge ſhall "certify the treſpaſs to be *wilful and malicious*, though the damages are under forty ſhillings, the plaintiff ſhall "have full coſts." See 3. Black. Com. 214. Eſpinaſſe Digeſt, 404.

EASTER TERM,

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powis, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*

Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

Anonymous. Caſe 219.

PER CURIAM. If an attorney be well known, and may be found, it is not ſufficient to leave a declaration for him in *the office*, but it ought to be delivered to him; otherwiſe it ſuffices to leave it in the office.

A declaration muſt be delivered to the attorney if known, or otherwiſe it may be left at the office.—1. Crompt. 88. Ld. Ray. 1407. 8. Mod. 227. 379. 12. Mod. 217. 232.

Anonymous. Caſe 220.

AN ACTION in this court upon a judgment for damages in the common pleas.

In debt on a judgment, the defendant cannot pay money into court before *plea pleaded*, although the plaintiff is become *bankrupt*.

SALKELD, *Serjeant*, now, *before plea*, moved to bring ſo much into court, and to have it ſtruck out of the declaration.

HOLT, *Chief Juſtice.* No: you may plead *tender* and *uncore prez.*

But then the Counſel diſcovered, that the plaintiff below was now become *a bankrupt*, and no commiſſion being out they durſt not tender him the money, but would bring it into court, to remain in truſt for him that ſhould have right.

7. Mod. 14. 140. 2. Salk. 583. 596, 597. Ante, 11. 25. 60. 101.

3. Mod. 236. 242. 305. 379. 10. Mod. 26. 12. Mod. 90. 187. 153. 241. 598. 614. 633. 1. Barnes, 197. 200. 281. 2. Barnes, 229. 275. 297. Stra. 142. 638. 787. 890. 906. 957. 1027. 1107.

ANONYMOUS. HOLT, *Chief Juſtice.* You are in the right to take care how you pay it voluntarily, but we cannot be truſtees for you.

And THE COURT would make no rule.

Caſe 221.

* Rich *againſt* Doughty.

An *eſcape warrant* granted on the 1. *Anne*, c. 6. muſt be executed by *a conſtable* or other legal officer; and therefore, although ſuch a warrant may be *granted* to *private perſons*, yet if *executed* by them, the party ſhall not be committed to the *common gaol*, but to the priſon from whence he eſcaped.

S. C. 3. Salk. 149.
Ante, 22. 63. 95. 125.
Poſt. 183. 253.
5. Mod. 8.
Hob. 63
12. Mod. 227. 230.
Comy. 554.
Stra. 99. 401. 423.
3. Com. Dig. "Eſcape" (E.).
Ld. Ray. 309. 353.

DOUGHTY was a priſoner in THE KING'S BENCH, and having eſcaped was taken up on a *Judge's warrant*, purſuant to the ſtatute 1. *Anne*, c. 6. by a parcel of people, whereof none was an officer. The act directs, "That if any perſon or perſons "rendered to or charged in cuſtody of the marſhal of the *King's* "*Bench* or warden of *the Fleet*, either in execution or on *meſne* "*proceſs*, or upon any contempt of the courts at *Weſtminſter*, "ſhall eſcape, it ſhall be lawful, upon oath thereof in writing, "made by one or more credible perſon or perſons before any one "of the Judges of that court where ſuch action was entered, "or judgment and execution were obtained, &c. for ſuch Judge "before whom ſuch oath ſhall be made as aboveſaid, to grant "unto any perſon whatſoever who ſhall demand the ſame, one or "more warrant or warrants under his hand and ſeal, therein "reciting the action, execution, or contempt, with which ſuch "perſon or perſons ſo eſcaping ſtood charged, directed to all "ſheriffs, mayors, bailiffs, conſtables, tithingmen, therein "and thereby commanding them, and any of them, in their "reſpective counties, cities, towns, and precincts, to ſeize and "retake ſuch perſon or perſons ſo eſcaped, and ſuch perſon or "perſons, ſo retaken upon ſuch warrant, forthwith to convey and "commit to the *common gaol* of ſuch county where ſuch perſon or "perſons ſo eſcaped ſhall be retaken, &c. &c."

MOUNTAGUE having diſcloſed the matter by motion, the ſheriff was ordered to return the warrant, which he did thus: "That he was brought to him in cuſtody of one *R.* and others to "him unknown, by virtue of the warrant, and that he detained "him in cuſtody *juxta exigentiam warranti præd.*"

BROTHERICK urged, that this act, being in aid of the execution of juſtice, ought to be favourably extended; and therefore that the priſoner being brought to the ſheriff, and delivered to him together with the warrant; and the warrant being directed "To "all ſheriffs, mayors, &c" the ſheriff at his peril muſt now detain him, though the original taking were illegal.

HOLT, *Chief Juſtice.* He is brought to the ſheriff by a warrant illegally executed, and therefore it is the ſame thing as if there had been no warrant at all. Suppoſe the ſheriff has a warrant for a man, and he is forcibly brought before him by a perſon who has no authority, the ſheriff cannot detain him by the warrant, by grafting a legal impriſonment upon an illegal one: if he do, an action of falſe impriſonment will lie againſt him. He

cannot

cannot juſtify receiving any perſon who is brought to him in illegal cuſtody, for he is not bound to receive him from any body but from *a conſtable* or other *peace-officer*. Indeed, if he aſk the perſon who brings the priſoner what he is, and the perſon affirms himſelf to be *a conſtable*, &c. he muſt believe him, and make a return accordingly.

Rios *againſt* Doughty.

And here the return not being filed, they gave him time to amend, which he would not do.

And at another day, the return being filed, THE COURT adjudged it inſufficient, and granted a *habeas corpus* to bring the priſoner back to the king's bench priſon.

Foxton *againſt* Moſely. Caſe 222.

COVENANT by an apprentice for not teaching him ſeveral trades in an indenture of apprenticeſhip mentioned.

In covenant, the defendant cannot, without *oyer*, ſet out the *indenture*, and plead "*covenants* "*performed.*" Ante, 28.

The defendant, inſtead of craving *oyer* of the plaintiff's indenture, ſet forth an indenture of his own, and pleaded a performance of the covenants therein contained.

* And, upon demurrer, it was adjudged for the plaintiff; for the defendant cannot ſhew any other indenture, but muſt crave *oyer* of the indenture declared on.

* [155].

1. Salk 498. Dougl. 467. 5. Com. Dig. "Pleader" (P. 1.). Comp. 56.

Collins *againſt* Jeſſot. Caſe 223.

KING moved for *a prohibition* to THE SPIRITUAL COURT for libelling there to diſſolve a marriage becauſe of *a pre-contract*.

Previous to the Marriage Act, the ſpiritual court was not prohibited from proceeding to diſſolve a marriage contracted *per verba de præſenti*, or *per verba de futuro*; for, in both caſes, the matter was matrimonial, and within the juriſdiction of the court: nor was it neceſſary for the libel to ſhew that a diſſolution of the contract was the object of the ſuit.

But the libel did not ſet forth that it was in order to a diſſolution; and therefore the ſuggeſtion was, that the libel did not in certainty ſhew the end of the proſecution, as it was ſaid they ought to do, that the Court here might ſee whether it was an end proper for them to proſecute for. *F. N. B.* 41. *a.*

HOLT, *Chief Juſtice*. If a contract be *per verba de præſenti*, it amounts to an *actual marriage*, which the very parties themſelves cannot diſſolve by releaſe or other mutual agreement; for it is as much a marriage in the ſight of God as if it had been *in facie eccleſiæ*; with this difference, that if they cohabit before marriage *in facie eccleſiæ*, they are for that puniſhable by eccleſiaſtical cenſures; and if after ſuch contract either of them lies with another, they will puniſh ſuch offender as an adulterer. And if the contract be *per verba de futuro*, and after either of the parties ſo contracting, without a previous releaſe or diſcharge of the contract,

S. C. 3. Salk. 437. S. C. Holt, 458. Poſt. 172. 5. Co. 51. 3. Lev. 65. 2. Lev. 15. 3. Mod. 165. 5. Mod. 411. Lutw. 68. Cro. Eliz. 79. Co. Lit. 34. Carth. 99. 1. Sid. 13. 2. Com. Dig. "Baron and Feme" (B.). (C.). Stra. 960.

Collins against Jennot.

marry another, it will be a good cauſe with them of a diſſolution of a ſecond marriage, and of decreeing the firſt contract's being perfected into a marriage.

Quæ omnia tota Cur. conceſſit, except the laſt point, whereof POWELL, *Juſtice*, doubted.

Upon which HOLT, *Chief Juſtice*, added, that it was firſt reſolved in my *Lord Vaughan's* time, that an action would well lie at common law for breach of ſuch an executory contract *per verba de futuro*; which reſolution VAUGHAN *totis viribus* oppoſed, becauſe the party had this remedy in the ſpiritual court, which was agreed by all. But notwithſtanding it was reſolved, that the party had his election of either remedy, and that by bringing an action at common law, and that appearing on record, the remedy in the ſpiritual court was actually releaſed; for now, in lieu of a performance of the contract, he ſhall recover damages. And he quoted a caſe which he remembered had been tried at GUILDHALL, which was an action for breach of ſuch a promiſe, and, upon iſſue of *non aſſumpſit*, proof was made of the promiſe, but the defendant ſhewing that he had been ſued for the ſame matter in the ſpiritual court, and producing a ſentence againſt the plaintiff, the plaintiff, notwithſtanding this proof, was nonſuited, becauſe that they were the proper judges in the ſpiritual court whether it were *a pre-contract* or not. * And if a man and woman make mutual promiſes of intermarriage *in futuro*, and the man give the woman a hundred pounds in ſatisfaction of the promiſe, and ſhe accepts it ſo, it is a good diſcharge of the contract *(a)*.

*[156]

Poſt. 172.
3. Lev. 65.
5. Mod. 411.

And being ſtirred again at another day:

The eccleſiaſtical courts have juriſdiction in all matrimonial cauſes.

2. Inſt. 488.
5. Co. 9.
Jones, 259.
Stra. 1056.
B. R. H. 326.
6. Com. Dig. "Prohibition" (G. 15.).

PER CURIAM. The ſpiritual courts have juriſdiction of all matrimonial cauſes whatſoever: and where it appears to us that the cauſe is ſpiritual, of which in conſequence they have conuzance, unleſs it be by reaſon of ſome collateral temporal matter in it, we ought not to prohibit them. And it is no reaſon here to prohibit them becauſe this may be a *future contract* for breach of which an action at law will lie, no more than when they libel for laying violent hands upon a ſpiritual man, for which an action at law lies for him for the battery, and a ſuit in the ſpiritual court for the irreverence to his character *(b)*.

(a) But now by THE MARRIAGE ACT, 26. *Geo.* 2. c. 33. ſ. 13. it is enacted, "That in no caſe whatſoever "ſhall any ſuit or proceeding be had "in any eccleſiaſtical court in order to "compel a celebration of any marriage "*in facie eccleſiæ*, by reaſon of any "contract of matrimony whatſoever, "whether *per verba de præſenti* or *per* "*verba de futuro*, any law or uſage to the "contrary notwithſtanding."

(b) See Kelly *v.* Walker, Cro. Eliz. 655.

And

And by HOLT, *Chief Juſtice*, There is a great diverſity between THE SPIRITUAL COURT and THE COURT OF ADMIRALTY in reference to ſuggeſtions for prohibitions; for THE ADMIRALTY has juriſdiction in reſpect of the locality of the cauſe of action, let the nature of the action be what it will; and therefore for a prohibition, though they lay the cauſe to ariſe *ſuper altum mare*, the party may ſuggeſt the contrary to ouſt them of juriſdiction; but the juriſdiction of the ſpiritual court is in reſpect of the nature of the thing, *viz.* whether it be *matrimonial* or *teſtamentary (a)*; and therefore, if it appear by the libel to be of that nature, we will not prohibit them.

The juriſdiction of THE ADMIRALTY ariſes from the *locality of the act*; and of THE SPIRITUAL COURT from the *nature of the act*. Hob. 79. 213. 2. Salk. 552.

POWELL, *Juſtice*, condemned the diverſity in *Fitzherbert (b)*, between a promiſe to give him ten pounds with his daughter in marriage, and to pay him ten pounds if he married his daughter. Poſt. 172.

HOLT, *Chief Juſtice*, ſaid, that by the firſt was underſtood ten pounds to be laid down upon the book at the time of marriage, and therefore it was matrimonial.

And the prohibition was denied PER TOTAM CURIAM.

(*a*) For the origin of the juriſdiction of the ſpiritual court in teſtamentary matters, ſee Lambard's Saxon Laws, 64. 111. Bp. Wilkins, 78. Lindwood, 194. Selden Eadm. 168.

(*b*) Fitz. N. B. 107. a.

Smith *againſt* Bartlett. Caſe 224.

DEBT UPON A BOND. The late act 8. & 9. *Will.* 3. c. 18. (*a*) of compoſition of two thirds in number and value of the creditors, was pleaded in bar, averring, that he was indebted to the plaintiff in forty-nine pounds on the ſeventeenth of *November*, 1697, and did then abſcond; a replication; and rejoinder.

A plea under 8. & 9. *Will.* 3. c. 18. muſt ſhew that the party was inſolvent at the beginning of the ſeſſions. Ante, 58.

* ACHERLY excepted to the declaration, that the abſconding ought to be averred on the firſt of *October*, that being the time on which the ſeſſion begun, and to which the act, as to this part, relates: and this appears plainly by the word "*have*" in the clauſe of abſconding in the ſtatute.

* [157]

Clift. 156. Lut. 266. 272. Comy. Rep. 112.

And judgment was given for the plaintiff.

(*a*) Repealed by 9. & 10. *Will.* 3. c. 29.

Famſhaw *againſt* Morriſon. Caſe 225.

Hilary Term, 3. *Anne*, *Roll* 139.

JUDGMENT was given in the court of common pleas upon *ſcire facias* on a recognizance by bail, THAT the original plaintiff ſhould have execution upon the recognizance, *et quod* "recover his *damages* ſuſtained by occaſion of the delay of execution," is erroneous; for the Court cannot award *damages*, but only *coſts of ſuit*.—S. C. 1. Salk. 208. Poſt. 159. Carth. 415. Skin. 300, 320. 3. Bac. Abr. 525, 526. Gilb. E. R. 195. 1. Barnes, 306.

A judgment in *ſcire facias* againſt bail, that the plaintiff "*do*

recuperet

TAMSHAW *againſt* MORRISON.

recuperet damna ſua, which he had ſuſtained *occaſione dilationis executionis*.

The exception taken upon a writ of error was, that the Court had no power to award *damages* for *delay of execution*, but they ſhould give him them for *coſts of ſuit*.

PER CURIAM. *Damages* generally include *coſts* (*a*), which word "coſts" properly ſignifies *coſts of ſuit*, and "delay of execution" is properly "damage," *viz.* the being ſo long out of his money, which the Court uſed formerly to aſſeſs, by allowing the party the lawful intereſt. So "damages of delay of execution" and "coſts of ſuit" upon the ſtatute (*b*) are very different, and to be aſſeſſed by different meaſures; and the ſtatute gives only *coſts of ſuit* againſt the bail, &c.

Therefore PER OMNES, this is error.

(*a*) See Aſhmore v. Ripley, Cro. Jac. 420.

(*b*) By 8. & 9. *Will.* 3. c. 11. ſ. 3. "In all ſuits upon any writ or writs of "*ſcire facias*, the plaintiff obtaining judgment, or any award of execution after "plea pleaded, or demurrer joined "therein, ſhall likewiſe recover his *coſts* "*of ſuit*, &c."

Caſe 226.

Rowſton *againſt* Combat.

To *aſſumpſit* in the king's bench, the defendant cannot plead *another action depending* for the ſame cauſe in the common pleas. Poſt. 103.

INDEBITATUS ASSUMPSIT for goods ſold and delivered. The defendant pleads, that he ought not to anſwer to the ſaid declaration, becauſe there is another action pending *ex eâdem cauſâ* in the court of common pleas.

PER CURIAM. This is not *a demurrer* to your declaration, or a *plea in bar*, but in *abatement* of the declaration.

And *reſpondeat ulterius* was awarded (*a*).

12. Mod. 48. 91. 204. 307. Fitzg. 313. Ld. Ray. 1014.

(*a*) For pleas of other action pending in bar or abatement, *vide* 6. Co. 7, 8, &c. Ferrars' Caſe. 5. Co. 7. b. 32. b. 4. Co. 39, 40. Cro. El. 668. Lat. 193. Mo. 458. 2. Vent. 168. 2. Mod. 2. 1. Lut. 41, 42, &c. Hob. 138, 139. See alſo Carthew, 455, 456. and poſt. 217, 218. —NOTE *to the former editions.*

*[158]

Caſe 227.

* Gilbert *againſt* Parker and Others.

In replevin, if the defendant plead that he was *ſeiſed* of the place where, and juſtifies the taking *damage feaſant*, the plaintiff may alledge that *he* was ſeiſed in fee of a *third part* of the place where, and traverſe the *ſole ſeiſin* of the defendant.—S. C. 2. Salk. 629. 9. Co. 66. 112. 8. Co. 89. 3. Lev. 104. Lutw. 1177. and 1316. 2. Salk. 580. 583. 5. Com. Dig. "Pleader" (G. 13.).

REPLEVIN for taking the plaintiff's cattle in ſuch a place. The defendant makes *conuzance* as ſervant to *G. P.* who was ſeiſed of the place WHERE in fee, and juſtifies the taking *damage feaſant*.

The plaintiff in bar of the conuzance alledges, that he himſelf was ſeiſed in fee of a third part of a moiety of a fifth part of the

place

place WHERE, and juſtifies putting in his cattle, ABSQUE HOC that the defendant's maſter was ſole ſeiſed thereof.

To which there was a demurrer.

BROTHERICK aſſigned for reaſon of the demurrer,

FIRST, That the *ſole ſeiſin* here is not alledged, and therefore not traverſable.

SECONDLY, This plea confeſſes and avoids our title, and for that too it is not traverſable.

He agreed, that whatever is neceſſarily implied in the making of a title may be traverſed; for if it be neceſſary, the plea will be bad without it be intended; and if it be neceſſary, and for that intended, it may be traverſed as a neceſſary part of the title: and a conuzance is in nature of a declaration, whereby one makes himſelf a title to diſtrain. And here the plaintiff ought to ſay that we have no ſeiſin at all, or to ſhew that he has a right to put his cattle there by ſome title conſiſting with ours; but now he brings in his own title by way of inducement, ſo that we cannot traverſe. And he offered to ſhew a diverſity between an avowry upon *a title* and conuzance or avowry for *damage feaſant*; for if one avow for rent, he muſt ſhew his title and tenure in particular (*a*), and there the defendant may traverſe any part of what he had ſet out; but to avow for *damage feaſant*, it ſuffices upon the whole matter that a title appears for him to diſtrain, though not exactly agreeing with what he ſet out; for there the plaintiff muſt ſhew the taking unjuſt, by making himſelf a title, or by utterly deſtroying the others (*b*).

HOLT, *Chief Juſtice*. You ſet out a ſeiſin in fee, and nothing more need be traverſed. And here he might have ſaid, that *J. S.* was ſeiſed, and derive title under him, ABSQUE HOC that you were ſeiſed; or that he was tenant in common with you, ABSQUE HOC that you were ſeiſed *modo et formâ*, and it had been well (*c*). In the caſe of *Cowper v. Temple* (*d*), the defendant juſtified diſtreſs, for that *A.* being ſeiſed of the place WHERE ſurrendered it to him and two more, who died, and conveys to him as ſurvivor, whereby he became ſole ſeiſed; the plaintiff replies, confeſſing the ſurrender to three, the death of two, but that one of them before his death ſurrendered his ſhare to him, ABSQUE HOC that the defendant was ſole ſeiſed, and it was adjudged good on demurrer. In treſpaſs, the ſole ſeiſin is traverſed, though but a ſeiſin in fee generally be alledged (*e*): and where one alledges ſeiſin in himſelf generally, it will not be enough for another to alledge * himſelf to be a tenant in common with him, without traverſing the *ſole ſeiſin*, for it is not a confeſſion and an avoidance. And if here he had replied, that

* [159]

(*a*) Poſt. 223. Carth. 179. 5. Mod. 150.
(*b*) Hob. 72. Moor, 863. Dyer, 280. 2. Vent. 228. Hutt. 120.
(*c*) Hob. 129.
(*d*) Cro. Eliz. 795.
(*e*) See Sir George Sparkes' Caſe, Winch. 7.

J. S.

GILBERT *againſt* PARKER AND OTHERS.

J. S. was ſeiſed in fee, and made title under him, ABSQUE HOC that the defendant was ſeiſed *modo et formâ*, and upon iſſue the defendant were found ſeiſed of a moiety only, it would be againſt him; for he avowed as one *ſole ſeiſed*, when it ſhould have been as tenant in common. And where *Dyer*, 280. is objected, Firſt, The Court were divided upon it; and ſecondly, there may be a difference between *coparceners* and *jointenants* and *tenants in common*; for the two firſt are ſeiſed *per my et per tout*, but the laſt have *ſeveral ſeiſins*; and here to introduce his traverſe he muſt make himſelf ſome title, to enable him to controvert with the defendant. And there is no difference between *an avowry* and *a juſtification*, as was urged; for in both, if the party ſet forth a falſity he is bound to maintain it.

Barth. 76. 96. 289. 364. 329. 505.

And ſo by THE WHOLE COURT judgment was given for the plaintiff *niſi*.

NOTE, As authorities were quoted at the bar 1. *Edw.* 4. *pl.* 9. 37. *Hen.* 6. *pl.* 31. *Br.* "*Traverſe*," 142. 21. *Edw.* 4. 65. *b.* 32. *Hen.* 6. 2. *b.* *Keilw.* 27. 1. *Lev.* 78.

BROTHERICK ſaid, that by the Year-Book 1. *Edw.* 4. *pl.* 9. it was agreed, that laying *a ſeiſin* generally in a declaration did not import *a ſole ſeiſin*, as it would in a bar, replication, &c.; and that *an avowry* was no more than *a declaration*.

But HOLT, *Chief Juſtice*, thereupon ſaid that an avowry was a declaration, and more.

Caſe 228.

Parkins *againſt* Chatherton.

Form of declaring in debt upon recognizance againſt the bail. Ante, 157. Poſt. 197.

DEBT upon a recognizance by bail in this court; and the declaration ſets forth, that the plaintiff in *Michaelmas Term* obtained judgment againſt their principal, and that in *Eaſter Term* before the defendants became bail by recognizance conditioned, &c. *in placito præd.*

1. Roll. Abr. 600. Cro. Jac. 45. 97. 1. Wilſ. 284. 1. Com. Dig. "Bail" (R. 1.). 3. Com. Dig. "Debt" (A. 3.).

To this it was objected, that it did not alledge that there was any action pending in *Eaſter Term*.

But PER CURIAM, It is well, and the common form of *ſcire facias* is ſo; therefore it will be as well in debt upon the recognizance.

Judgment was given for the plaintiff.

Harvey

Harvey *againſt* Broad.

Caſe 229.

WRIT OF ENQUIRY was returnable *tres Trinitatis*, which happened to be on *a Sunday*, ſo that *the eſſoins* were kept on *the Monday*. The writ is returned to have been executed the fourteenth of *June*, which was the day after the return, viz. *Monday*.

If a writ cannot be legally executed on the day of its return, it ſhall not be executed the next day.

PER TOTAM CURIAM. Without doubt a writ may be executed on the day of its return, yet if that day be ſuch a day as it cannot be legally done on, they * ſhall not do it the next day. THE KALENDAR is law, of which we, as Judges, muſt take notice. Such a fault may be aſſigned for error *ore tenus* at the bar. The diſtinction in the books that we ought to take notice of *immoveable* but not of *moveable* Feaſts is vain, for we know neither one nor the other but by THE ALMANACK; and we are to take notice of the courſe of the moon *(a)*.

* [160]

S. C. ante, 148. S. C. poſt. 196. S. C. 2. Salk. 626. S. C. Holt, 761. Ante, 148. Poſt. 196. 250. Fitzg. 95. Ld. Ray. 353. 1142. 1557. 6. Com. Dig. "Return" (C. 1.).

But at the importunity of HALL, *Serjeant*, they gave time to ſpeak to it upon this point, *viz.* Whether, it not being aſſigned on record, but only *ore tenus*, the Court were bound to take notice of it *(b)*.

(*a*) See ante, 41. 81. Poſt. 252. 1. Leon. 242.

(*b*) The Court was of opinion, that they were bound to take notice of it, though not aſſigned for error on the record. S. C. poſt. 196.—See alſo 6. Com. Dig. "Temps" (B. 2).

Oates *againſt* Bromell.

Caſe 230.

DEBT UPON A BOND for performance of an award, *ita quod* it were made and ready to be delivered to the parties, or ſuch of them as ſhould deſire it, by ſuch a day: *no award* pleaded, and a parol award ſet out, and avers, that it was ready to be delivered to the ſaid parties: and a demurrer;

If a bond of arbitration be conditioned "ſo as "it be made "and ready to "be delivered "to the parties "on or before "ſuch a day," the arbitrators may make *a parol award*; for ſuch an award is capable of being *delivered*, and the words do not neceſſarily import that it muſt be *in writing*.

For, by BROTHERICK, the words "ready to be delivered" neceſſarily import, that the award was to have been in *writing*: and he quoted the caſe *Wood v. Ardiſt* (*a*) in the common pleas, in *Trinity Term*, in the firſt year of the reign of *Queen Anne*, in the very point; and inſiſted much upon *Hungate's Caſe (b)*, where the condition of the performance was, *ita quod arbit. fiat et deliberetur utriq. partium*, there being two defendants, and held, that a delivery to one of them was inſufficient, yet, if it could be a parol award, a publication of it to both would be ſufficient.

SALKELD *contra*. "Parol" may be delivered as well as "writing;" as, in common parlance, "to deliver a meſſage," "to deliver

S. C. poſt. 176.

S. C. 1 Salk. 75. S. C. Holt, 82. Ante, 82. 1. Salk. 69. Cro. Jac. 541. Ld. Ray. 535. 1141. 1076. 1. Barnes, 41. 1. Com. Dig. "Arbitrament" (E. 5.). (I. 6.). 3. Viner Abr. 226. 2. Bac. Abr. 148, 149.

(*a*) (*b*) 5. Co. 103.

"himſelf

OATES *againſt* BROMELL.

" himſelf well," when a man expreſſes his thoughts gracefully. " Delivery" is to be underſtood *ſecundum ſubjectam materiam*; if it be of a writing, it muſt be a manual; if of a parol matter, it muſt be an oral delivery; and he relied on the caſe of *Cocks v. Macclefield (a)* as full in the point, and the caſe of *Capell v. Rogers (b)*, and ſaid, that *Bendloe's* report of *Cocks v. Macclefield (c)*, which ſeems to differ from *Dyer*, is a very obſcure report of the caſe.

HOLT, *Chief Juſtice.* There are two diſtinct things to be done: FIRST, The making, and, SECONDLY, To be ready to be delivered. If it had been, "*ſo as* the ſaid award be ready to be " delivered," it might be well. If it were in writing, it would ſuffice to ſay that it was made; for what is made in writing, then is ready to be delivered, becauſe then it is deliverable. But the queſtion is, Whether *a parol award* be properly deliverable, or whether we ſhall not underſtand the meaning of the words " ready to be delivered" to be a delivery in writing? And he and THE COURT ſeemed clear it ſhould be ſo underſtood.

But another day HOLT, *Chief Juſtice*, having ſeen the caſe above of *Cocks v. Macclefield* in *Dyer*, and the record of it in *Coke's Entries*, ſaid, they were very ſtrong authorities for the plaintiff, and that the award might have been made behind the parties backs, and delivered, *viz.* pronounced over * again to their faces; and if ſo, what may be delivered may be ready to be delivered; and that the caſe, as it is reported in *Bendloe*, had neither head nor tail to it.

* [161]

POWELL, *Juſtice.* If the words had been only, " SO AS it be " made and delivered," I would take delivery to be only to give the parties notice of the award; but " ready to be delivered," I think, muſt be a delivery in writing; and if iſſue were taken upon the readineſs of delivery, how ſhould it be tried?

HOLT, *Chief Juſtice.* If it were *res nova*, I ſhould be apt to think ſo too; but when I find ſo clear an authority in the caſe, and ſome reaſon for it, I cannot depart from it.

And ſo ſaid GOULD, *Juſtice.*

But they would be well informed of the caſe quoted lately in the common pleas, and no rule was given (*d*).

(*a*) Dyer, 218. pl. 5. S. C. Co. Ent. 226.
(*b*) 3. Bulſt. 311.
(*c*) Bendloe, 97.
(*d*) This caſe was argued again, S. C. poſt. 176. and the Court, on conſideration, gave judgment for the plaintiff. S. C. 1. Salk. 75.

EASTER TERM,

The Third Year of Queen Anne,

AT

The Sittings

BEFORE

Sir John Holt, *Knt. Chief Juſtice*

OF

THE COURT OF QUEEN'S BENCH.

---

* Holmes *againſt* Hall. Caſe 231.

INDEBITATUS ASSUMPSIT by an executor for ſo much money of the teſtator received by the defendant to the uſe of the executor.

If an executor give a perſon a ſum of money on his promiſing to deliver up certain writings then in his poſſeſſion belonging to the teſtator, and he afterwards refuſes to perform his promiſe, the executor may recover back the money ſo paid by *indebitatus aſſumpſit.*

The evidence was, that ſome writings of the teſtator came to the defendant's hands, which he would not deliver up to the executor, who, to get the writings, gave him ſo much money, whereupon he promiſed to give up the writings, but afterwards refuſed.

DARNELL, *Serjeant*, objected, that the plaintiff had miſtaken his action; for he ſhould have brought an action on the caſe upon the ſpecial agreement for non-delivery of the writings.

HOLT, *Chief Juſtice.* If *A.* give money to *B.* to pay *C.* upon *C.*'s giving writings, &c. and *C.* will not do it, an *indebitatus* will lie for *A.* againſt *B.* for ſo much money received to his uſe; and many ſuch actions have been maintained for *earneſts* in bargains when the bargainor would not perform, and for *premiums* for inſurance when the ſhip, &c. did not go the voyage (*a*). But it has been held, that it will not lie for money paid upon a *uſurious contract*, becauſe there it is not intended that it ſhould be repaid, or anything done for it. Indeed, theſe caſes of *indebitatus* for

S. C. Holt, 36. Poſt. 309. 1. Salk. 24. 28. 12. Mod. 650. Ld. Ray. 1413. 1. Bac. Abr. 167.

(*a*) See 1. Show. 156. 1. Salk. 22. Skin. 412. Park on Inſurances, 397, 398.

money

HOLMES v. TYRELL.

money received to uſe have been carried too far, and no body would more willingly check them than I would. Therefore it ſhall be ſaved you if you will, but I will not nonſuit the plaintiff.

But it appeared on the evidence, that the defendant pretended to the money as due from the teſtator, and would not deliver the writings without payment, and that the money was given in ſatisfaction of the debt.

So it was clear againſt the plaintiff, and he was nonſuited.

*[162] * And DARNELL quoted a caſe, where, he ſaid, one had undertaken to obtain a pardon for another, and to that end got ſeveral ſums of money from him, but had not got the pardon, and an *indebitatus* for money to the plaintiff's uſe was brought, and yet the plaintiff had been nonſuited before HOLT, *Chief Juſtice*.

Which HOLT, *Chief Juſtice*, utterly denied.

Caſe 232. Langford *againſt* Adminiſtratrix of Tyler.

If huſband and wife cohabit, he is liable to her contracts, though ſhe deals as a *ſeparate trader*.
S.C. 1. Salk. 113.
S.C. Holt, 96.
Skinner, 349.
Ante, 105. 147.
Poſt. 230.
2. Vern. 118.
10. Mod. 6.
11. Mod. 253.
12. Mod. 603.
Gilb. E. R. 83.
Ld. Ray. 444. 1006. 1248.

THE DEFENDANT, now adminiſtratrix to *Tyler* her late huſband, in his life-time uſed to deal in tea, and ſold four butts of tea to the plaintiff at ſo much a pound. The plaintiff took one away, paying for it, and fifty ſhillings over, to go towards payment of the reſt. When ſhe came for the reſt, the vendor would not ſtand to her agreement.

An action was brought, and two counts, one upon *the agreement*, and the other an *indebitatus* for fifty ſhillings received to the plaintiff's uſe.

Theſe points were ruled by HOLT, *Chief Juſtice*.

FIRST, If a huſband and wife cohabit, and the wife deal ſeparately, her contracts ſhall charge the huſband, for cohabitation is ſufficient evidence of notice.

Goods ſold muſt be paid for on delivery, though *earneſt* was given, unleſs they were ſold on *credit*.

SECONDLY, If a bargain be made, and earneſt given, without an expreſs agreement that payment is to be made at a certain time, the money muſt be paid before the goods be removed (*a*).

The delivery of goods bought cannot be demanded without a tender of payment.

THIRDLY, A demand of the goods without a tender of the money is void, becauſe it is not purſuant to the intent of the bargain, and the earneſt is only to bind the bargain.

(*a*) By 29. *Car.* 2. c. 3. ſ. 17. "No "contract for the ſale of any goods, for "the price of ten pounds ſterling or up- "wards, ſhall be allowed to be good, "except the buyer ſhall accept part of "the goods ſo ſold, and actually receive "the ſame, or give ſomething in earneſt "to bind the bargain, or in part payment, "or that ſome note or memorandum "in writing of the ſaid bargain be made "and ſigned by the parties to be charged "by ſuch contract, or their agents law- "fully authorized."

FOURTHLY,

FOURTHLY, After earneſt given, the vendor cannot ſell to another *(a)*; but if the vendee do not come to pay and take the goods, the vendor ought to come and requeſt him to come and pay; and if he do not come in convenient time, the agreement is diſſolved, and then he may ſell.

If goods be ſold, and earneſt received, the vendor cannot ſell to another, unleſs the vendee refuſes to take them.

(*a*) If a vendor ſell goods by ſample, to be delivered to the vendee within a month, and take earneſt, and within a month ſend them by his ſervant to the premiſes, and when part are unloaded the reſt are diſtrained for toll, the delivery is complete, ſo as to intitle the vendee to bring treſpaſs for the ſeizure. Blakey v. Dinſdale, Cowp. 664.

EASTER TERM,

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.*
Sir Henry Gould, *Knt.* } *Juſtices.*

Edward Northey, *Eſq. Attorney General.*
Sir John Hawles, *Knt. Solicitor General.*

More *againſt* Rowbothom. Caſe 233.

Part owners of a ſhip, diſſenting from the voyage, may arreſt the ſhip in THE ADMIRALTY, and oblige the aſſenting owners to give *caution*. S. C. 6. Viner, 515. c. 20. Ante, 12. 26. 79. Hob. 79. Carth. 26. 166. 518. 1. Show. 14, 15. Hard. 473. Skin. 230.

SEVERAL part-owners of a ſhip, ſome whereof were againſt freighting her.

By a courſe in THE ADMIRALTY in ſuch caſe, for advancing of navigation, THEY DECREE, that the majority ſhall prevail and freight, they giving the diſſenting party *caution* for their parts of the ſhip againſt all riſques; which was done here. The ſhip being loſt, thoſe who gave the *caution* were libelled againſt; and ſentence was given in THE ADMIRALTY.

And now *a prohibition* was moved for, ſuggeſting, that the *caution* was given upon land, and that all matter of property is to be ordered by the common law only.

And THE COURT ſeemed ſtrong, that they had ſuch a power; and if ſo, by conſequence they have no juriſdiction over the *caution* as incident thereunto.

2. Chan. Caſ. 36. Fitzg. 197. 2. Stra. 890. Ld. Ray. 223. 235. 984. 1285.

MORE *againſt* ROWBOTHOM.

Yet it being matter of conſequence, and never yet determined, they granted *a prohibition*, and directed them to declare according to their ſuggeſtion forthwith *(a)*.

A prohibition ſhall go *after ſentence* for want of juriſdiction.

And though it be after ſentence, yet if they had no juriſdiction, a prohibition ought to go.

And ſo it was ruled.

2. Burr. 813. Cowp. 422. 424. 1. Term Rep. 3. 552. 2. Term Rep. 473. 6. Com. Dig. "Prohibition" (D.).

(*a*) It was ſettled in the caſe of Dimmock *v.* Chandler, Hilary Term, 4. Geo 2. that where there are ſeveral part owners of a ſhip, and one or more of them fits her out for a voyage, the reſt of the owners may ſue proceſs out of THE COURT OF ADMIRALTY to arreſt the ſhip, and compel the owners engaged in the outfit to give in *ſecurity* there to anſwer to *them* their ſeveral proportions of the freight, and the value of their reſpective ſhares in the ſhip, in caſe ſhe ſhould be loſt in the voyage. Fitzg. 197. S. C. 2. Stra. 850.—And this caſe has been ſince recognized as law, Ouſten *v.* Hebden, 1. Wilſ. 101.; Blacket *v.* Anneſley, 1. Ld. Ray. 235.; Menetone *v.* Gibbons, 3. Term Rep. 267.; Smart *v.* Wolf, 3. Term Rep. 323.

*[163]

Caſe 234. * The Queen *againſt* The Inhabitants of Cluworth.

The Court will not fine a defendant convicted of not repairing a way, until it be certified whether it is or is not repaired.

THE INHABITANTS of the pariſh of *Cluworth* were indicted for not repairing a common footway, and ſubmitted by pleading *guilty*.

But THE COURT, before they would ſet a fine, would be certified by ſome of the juſtices of the peace of the neighbourhood that the way was ſufficiently repaired; which they did.

S. C. 1. Salk. 358. 3. Com. Dig. "Chimin" (D. 6.).

A *diſtringas* ſhall go, on non-repair of a way, although the offender has been fined.

PER CURIAM. If one be found *not guilty* upon an indictment for not repairing a highway, he is quit for being fined; but a *diſtringas in infinitum* ſhall go to the ſheriff againſt him till he certify that the way is repaired.

Perſons uſing navigable rivers have a *right of path* on its banks.

And by HOLT, *Chief Juſtice*, If one have land adjoining on a *navigable river*, every one that uſes that river has, if occaſion be, a right to a way by the brink of the water over that land, or farther in if neceſſary.

Ante, 3. 149. 3. Com. Dig. "Chimin" (D. 4.).—But ſee the caſe of Ball *v.* Herbert, 3. Term Rep. 253. that the public are not intitled at the *common law* to tow on the banks of ancient navigable rivers; the right muſt be founded either on *ſtatute* or on *uſage*.

A perſon bound to repair a way need not make it better than it was.

If a man be bound by preſcription to repair a way, he is not bound to put it into better repair than it has been in time out of mind before.

S. C. 1. Salk. 358. Ante, 3. 149. Jones, 296. Ld. Ray. 725. 858. 1169. Sayer, 93. Dougl. 719.

Sexton's Case. Case 235.

AN ADMINISTRATRIX owing money to *A.* as such, but nothing in her own right, was arrested by him by a writ, without naming her administratrix; and she being thus under arrest, gave a warrant of attorney to confess judgment: whereupon judgment was entered, and her goods taken in execution.

A *warrant of attorney* given by an *administrator* for a debt due by the intestate under an arrest as for his own debt is void. Ante, 85.

And all this appearing by THE MASTER'S report, though there had been an attorney by at the executing of the warrant of attorney, the judgment was set aside for irregularity, and restitution awarded; for she was in custody without any foundation, and under that terror gave the warrant. PER CURIAM.

1. Salk. 399, 400. 7. Mod. 115. 139. Cowp. 141. 281.

The Queen *against* The Inhabitants of Newnham Murrey. Case 236.

AN ORDER OF JUSTICES was, "WHEREAS complaint has "been made to us by the churchwardens, &c. of *A.* that *B.* "came to settle in such a parish contrary to law, therefore they "ordered him to another place."

An order of removal must adjudge, that the pauper was *likely to become* chargeable. Ante, 87, 88. Post. 213. 287.

And it was quashed, for want of an adjudication that he was likely to become chargeable.

2. Salk. 478, 479. 491. Carthew, 28. 222. 365. 396. 516, &c. Stra. 142. 393. 698. 2. Bott P. L.

The Queen *against* Gold. Case 237.

GOLD was indicted, for that one *A.* a poor boy being set out to him as *an apprentice*, pursuant to the statute 5. *Eliz.* c. 4. he *vi et armis* refused to provide for him.

An indictment lies for *disobeying an order* of justices in not receiving and providing for a pode apprentice, pursuant to 43. *Eliz.* c. 2.; but being a *non-feasance*, it ought not to be laid *vi et armis*. S. C. 1. Salk. 381. S. C. Sett. & Rem. 133. 1. Salk. 66. 68. Post. 164. 12. Mod. 27. Ld. Ray. 1369. Stra. 1268. 2. Burr. 799. 832.

It was moved to quash it;

FIRST, * Because it was not a matter indictable.

SECONDLY, In case it be indictable, there should have been first an application to a justice of peace, and after an appeal to the sessions, and then perhaps for disobedience to such orders an indictment would lie.

THIRDLY, It is laid to have been *vi et armis*, which is absurd, it being for a nonfeasance.

PER CURIAM. If this had been the case of a *common apprentice*, an indictment would not lie *(a)*. Indeed formerly it has been held generally, and by all the Judges in *Pyne's Case (b)*, that the justices could not compel a man to take an apprentice upon the statute 43. *Eliz.* c. 2.; but since the contrary opinion has pre-

(a) See Rex v. Treyllian, 2. Stra. 1268. (b) 3. Keb. 628. 686. 854.

THE QUEEN *against* GOLD.

vailed (*a*). And then when we allow them such power, of necessary consequence we must allow an indictment for *disobedience to their orders* (*b*), either in not receiving, or receiving and after turning off, or not providing for such apprentice. And though an act of parliament prescribe an easier way of proceeding by complaint, as is urged, yet that does not hinder an indictment (*c*). And though the *vi et armis* in this case be absurd, yet it is only *surplusage*, which will not vitiate.

2. Salk. 491.
1. Sid. 99.
1. Salk. 67.
1. Lev. 84.
Ray. 65.

And THE COURT refused to quash it.

(*a*) The King *v.* Fairfax, 3. Mod. 270. S. C. 1. Show. 76.—See also Rex *v.* Cross, Comb. 289.; Rex *v.* Fleet, Cald. 31.; Rex *v.* Clapp, 3. Term Rep. 387.; Rex *v.* Tunstead Happing, 3. Term Rep. 523.; Rex *v.* St. Nicholas, Nottingham, 2. Term Rep. 726.

(*b*) See Rex *v.* Balme, Cowp. 648.

(*c*) The 8. & 9. *Will.* 3. c. 30. enacts, that when any poor children shall be appointed to be bound apprentices, pursuant to the 43. *Eliz.* c. 2. s. 5. the person or persons to whom they are so appointed to be bound, *shall receive* and provide for them according to the indenture, signed and confirmed by the two justices of the peace, and also execute the other part of the said indentures: and if he or she shall refuse to do so, oath being made thereof by one of the churchwardens or overseers of the poor, before any two justices of the peace for that county, &c. he or she shall forfeit for every such offence the sum of TEN POUNDS.—See also 32. *Geo.* 3. c. 57.

Case 238. Caly *against* Hardy, Golson, and other Justices of the Peace of the Town of Ipswich.

If a forcible entry be committed, and all the *justices of the corporation* refuse to enquire of the force, it may be made by the *justices of the county*.

THE MAGISTRATES of the town of *Ipswich* had a mind to turn the *clerk of the market* out of his place, and procured a *forcible entry* to be made upon THE MARKET-HOUSE to get the possession thereof from him; and the justices of the town being, as was suggested, in the faction, would not inquire of the force.

HOLT, *Chief Justice*. If all the justices of a corporation are concerned in a force, and will not enquire of it, the next justices of the county shall do it; for the denying to do it is a forfeiture of their exemption from the county.

S. C. ante, 139.
S. C. Holt, 407. 12. Mod. 403. Stra. 1154. 1173. 1222.

A MANDAMUS directed to all the justices of a corporation *jointly and severally* to enquire of a forcible entry.—S. C. ante, 139.

And here a *mandamus* was granted jointly and severally to all the justices of the town to inquire of the force, for THE COURT would suppose them all guilty.

Case 239. The Queen *against* Tutchin.

If a person . . . to the . . . demeanor, the secretary may bind him to appear in the king's bench, but not to his . . . .—S. C. post. 268 S. C. 1. Salk. 51. S. C. Holt, 424. S. C. 5. St. Tr. 532. . . . Ray. 1061. Post. 268. 1. Salk. 48. 2. Salk. 699. 5. St. Tr. 544.

TUTCHIN was the author of a seditious paper called "THE "OBSERVATOR," and an order of the house of commons against him for apprehending him, and likewise A PROCLAMA-

TION,

TIONS, with a reward for taking him up; but he abſconded a long time, but did not deſiſt from writing on, very ſcandalouſly, againſt the Government. And now at laſt he * ſurrendered himſelf to THE SECRETARY OF STATE, who bound him to appear here the laſt day of this Term, and to his *good behaviour* in the mean time. THE QUEEN *againſt* TUTCHIN.

An information being now filed againſt him, he, by his Counſel, prayed *time to plead* till next Term.

PER CURIAM. If he had been ſummoned, and had not appeared, but had been brought in upon the *capias*, he muſt have pleaded *inſtanter*; but appearing upon his recognizance, he ought to have convenient time: and now he muſt renew his recognizance here, that is, give new bail, or the ſame, if good, may enter into a new recognizance; and though we do record his appearance now, and give him leave to go look for bail, yet if he do not come ſitting the Court, we may call him, and record his default: and we cannot well bind him to his *good behaviour*; for it is not uſual, when we proceed in order to convict a man, to bind him to his good behaviour in the *interim*.

If a perſon ſurrender to an information for a miſdemeanor, he may, on removing his recognizance, have *time to plead*; but if he is brought in on a *capias*, he muſt plead *inſtanter*.

Gawdy *againſt* Pickerſdale. Caſe 240.

ERROR OF A JUDGMENT againſt an executor in *Rippon Court*.

The verdict gave the plaintiff three pounds damages, one ſhilling coſts, and five pounds ten ſhillings *de incremento*: and judgment *quod quer. præd. ſummas attingent.* to ſeven pounds, &c. *de bonis teſtatoris, ac ſi de bonis propriis* of the defendant.

An *inferior court* may amend errors of fact in the record by the minute-book.

Hob. 128.
2. Salk. 47. 53.
Carth. 157.
2. Lev. 22.
Cowp. 407.
1. Term Rep. 783.

PER CURIAM. We will not ſuffer them to amend any error in knowledge or ſkill by their books of minutes; yet we will allow amendments of errors in fact in the record by the minute-book, if it appear upon examination to have been originally right in the book, and not made for that purpoſe.

And HOLT, *Chief Juſtice*, remembered the caſe of *Sanderſon v. Laniere (a)*, where in error on a judgment in the *court of Northampton* they would not ſuffer them to amend *præceptum fuit* into *præceptum eſt*; yet in the ſame caſe there were but eleven jurymen named in the record, there being twelve in the book, they ſuffered them to amend that.

(a) 3. Salk. 31.

EASTER TERM,

The Third Year of Queen Anne,

AT

The Sittings

BEFORE

Sir John Holt, *Knt. Chief Juſtice*

OF

THE COURT OF QUEEN'S BENCH.

The Warden and Company of Sadlers of London *againſt* Jones.

Caſe 241.

THE COMPANY OF SADLERS brought debt upon the ſtatute of 1. *Jac.* 1. c. 22. ſ. 44. againſt the defendant, for that being *a ſadler*, he did make five hundred ſaddles inſufficiently and unſubſtantially, *contra formam ſtatuti*, and ſo became indebted to them in the forfeiture.

If a ſtatute declare "that the "ſkins of ſheep, "being tanned "or tawed, and "every ſalt hide, "ſhall be re-"puted and "taken to be "*leather*," and there are two kinds of tawing, one dry, which leaves the fur on, and the other wet, by a preparation of ſalt and allum, a ſheep-ſkin prepared with white allum is *leather* within the meaning of the act.

Upon evidence the caſe was thus:

* The *King of Portugal's* envoy reſiding here, directed the defendant to make him five hundred ſaddles for war, for the uſe of the king his maſter, after the pattern of a ſaddle brought for that purpoſe from *Portugal*, the ſeat whereof was covered with goat-ſkin, and ſtuffed on the outſide with ſtraw. The defendant made ſome twenty ſaddles in imitation of the pattern, but covered the ſeat with white allumed ſheep ſkins, and inſtead of ſtraw ſtuffed them with hay on the outſide. The Company finding this matter applied to *the envoy*, informing him of the cheat put upon him; who thereupon countermanded the defendant for ſome time, until he had examined and compared his work with the pattern, and after ordered him to go on, which he did. The ſaddles were all made, as aforeſaid, paid for, and ſent to *Portugal*.

This action was now brought for the penalty.

THE

THE WARDEN AND COMPANY OF SADLERS OF LONDON *against* JONES.

THE FIRST QUESTION was, Whether "allumed ſheep-ſkins" were "leather" within the act? And it appears by ſect. 49. that it is "if tanned or tawed." And it appearing by evidence that there are two ſorts of tawing, one dry, which leaves the fur on, the other wet, which is done with ſalt and allum, it was clear, ſheep ſkins allumed were leather within the act.

If a ſtatute enact, "that "whoſoever "ſhall not "make the "wares be-"longing to "ſadlery ſuffi-"ciently and "ſubſtantially "ſhall be liable "to a penal-"ty," and deſcribe the manner in which the leather ſhall be made, a *ſadler* who uſes leather not dreſſed according to the ſtatute is not liable to the penalty, *if the buyer* is ſatisfied with the commodity.

THE NEXT QUESTION was, Whether it were proper for the uſe that it was put to by the defendant? and if not, Whether employing it improperly would bring the defendant within the words, "not ſubſtantially and ſufficiently made up?"

HOLT, *Chief Juſtice*, as to this ſaid, that if the jury would think it improper for that uſe, he would have the reſt found ſpecially; for if theſe words (as it was urged) were only applicable to the making-up and workmanſhip, without regard to the materials, that being provided for by other clauſes of the ſtatute, a ſadler, he ſaid, who has bought good leather according to the ſtatute, and ſuffered it to rot, and after worked it up into ſaddles, &c. would be diſpuniſhed by that conſtruction.

SECONDLY, He ſaid, that the meaning of the ſtatute was to prevent people's being cheated by having ill goods put upon them; and if this kind of ſheep-ſkins was not according to the ſtatute, yet if the buyer knew it, and were ſatisfied therewith, it would be no crime; for the ſtatute did not deſign to take away any man's liberty of uſing what he pleaſed, that is, buying and contracting for what he pleaſed.

But THE JURY found for the defendant generally.

Freemen of a Company diſfranchiſed are competent witneſſes.

NOTE, In this caſe three of the Company were diſfranchiſed to be legal evidence, they declaring upon a *voir dire* that they had no aſſurance of being received again.

*[167]

Caſe 242.

* Neal *againſt* Goulſton.

Debt upon a bond not ſpecified in taxation according to a late act. Poſt. 184.

DEBT UPON A BOND conditioned for payment of money, and therefore to be ſpecified in taxation according to the late act of parliament.

By HOLT, *Chief Juſtice*, upon evidence. If *the certificate* produced bear date in due time, I will not doubt but that it was then delivered, or now, that it bears but a very late date; yet if you prove that it was taxed in due time, it will ſuffice; or, laſtly, if it has not been taxed in due time, yet if you have *a tally* to produce that you have paid the double tax for the penalty, it will do.

And the plaintiff failing in all was nonſuited.

And here HOLT, *Chief Juſtice*, put the caſe, where an obligee had been beyond ſea all the while; but reſolved nothing as to that.

Oſbourne

Osbourne *against* Hosier.

Case 243.

DEBT was brought upon a single bill for payment of two hundred and thirty pounds on demand.

Comparison of hands is good evidence to prove the *attestation* of a bond.

S. C. Holt, 198.

Upon *non est factum* pleaded, one of the subscribing witnesses was produced, and gave full evidence of the ensealing and delivery of the bond.

On the other side was produced a person of the same name and surname with the other subscribing witness; who acknowledged, that the hand was very like his, but that it was not his; that he never knew either of the parties, nor the other witness, nor could the other witness say that he was the man; and both their reputations being made good in proof,

HOLT, *Chief Justice*, ordered them both to write their names, and thereupon left it to the jury, who found for the plaintiff.

In debt on a single bill payable on demand, *interest* may be given in damages.—5. Com. Dig. "Obligation" (C.).

And here HOLT, *Chief Justice*, ruled, that this being a single bill, it needed no specification according to the late statute, because it did not carry interest, yet directed the jury to give damages, *viz.* interest.

Want of demand must be specially pleaded. Ante, 85. Post. 184.

And where it was objected, that it was payable on *demand*, and that no damages or interest incurred till demand, and none was proved;

HOLT, *Chief Justice*, said, that could not have been taken advantage of upon "*non est factum*," or any other collateral issue, but should have been pleaded.

(*a*) But see the case of Swire *v.* Bell, 5. Term Rep. 371.

The Queen *against* Carter.

Case 244.

CARTER was indicted for a wilful and corrupt perjury; and the indictment, reciting THE RECORD of the trial at which it was supposed the perjury was committed, being a feigned issue out of chancery, set forth, that there happened a discourse between my *Lord Wharton** and *Sir W. R. R. S. R. R.* and *J. S.* concerning the boundary of certain lands; and my *Lord Wharton* affirmed *A.* to be a boundary; the said *Sir W. R. R. S.* and *J. S.* affirmed, that *A.* was not the boundary. Whereupon a wager was laid, and mutual promises were made between the *Lord Wharton* and them the said *Sir W. R. R. S. R. R.* and *J. S.*

If an indictment for perjury, in reciting the record of the trial, state a fact as happening between *A. B.* and *C.* and it appears from the record produced in evidence that the fact happened between *A.* and *B.* only, *the variance* is fatal.—S. C. Holt, 347. 5. Mod. 343. 349. 4. Burr. 2269. 2. Hawk. P. C. ch. 69. s. 22. 1. Salk. 374. 2. Salk. 514. 1. Sid. 106. 237. 377. 454. 1. Ven. 182. 370. Hob. 55. & *quære*. Hob. 59. Farest. 101. 1. Sid. 148. 153. 217. Raym. 74. 1. Keb. 531. 2. Salk. 660. 10. Mod. 194. 12. Mod. 139. 511. Ld. Ray. 257. 887. 1221. Comy. 43. Stra. 921. 1230. 1. Peer. Wms. 568. 3. Peer. Wms. 196. 244. 311.

And now at the trial of the indictment this variance was assigned between *the record* they took upon them to recite, and *the indict-*

ment,

THE QUEEN *againſt* CARTER.

ment, that the affirmation that *A.* was not a boundary was in *the record* laid to have been by *Sir W. R. R. S. R. R.* and *J. S.* whereas *the indictment* laid it to have been by *Sir W. R. R.* and *J. S.* omitting *R. R.*; ſo this record now produced in the court was not the record deſcribed in the indictment.

And this ſeemed a good exception: for by HOLT, *Chief Juſtice*, If you bring an *aſſumpſit* againſt two, and give evidence only of an *aſſumpſit* by one, you are gone.

"*Barnap*" for "*Barnap*," and "*orientati*" inſtead of "*orientali*," are fatal *variances* between an *indictment* for perjury and *the record* of the trial.

ANOTHER VARIANCE was, that in one of the denominations of lands in the record it was *Barnap*, and in the indictment *Barnep (a)*.

Another word in the record was *orientati*, and in the indictment *orientali*.

And all theſe being in the deſcription of the record ſeemed fatal.

In perjury, if the record of the trial be not entered up, it cannot be proved by the minutes.

But ANOTHER FAULT yet groſſer was, that the record of the trial at which the perjury was alledged was not entered up; ſo it did not appear that ever there was a trial.

HOLT, *Chief Juſtice*, denied the minutes of it for evidence, and quoted a caſe where a rank perjury had gone unpuniſhed for ever for that omiſſion; for that he ſaid was final, ſo as the party could never be tried thereon again.

An acquittal for a defect in the indictment muſt not be pleaded in bar to a ſecond indictment for the ſame offence.

But in this caſe he ſaid, that by reaſon of the other exceptions, the indictment being inſufficient, they might indict him anew; for an acquittal upon a bad indictment would not be a plea to a good one (*b*); whereas if the indictment had been good, an acquittal upon the laſt fault had been peremptory (*c*). And here the indictment being brought to trial by the defendant, if he have made it up variant from what it is upon THE PLEA ROLL, an acquittal upon it will be void.

Recognizance forfeited by not trying the cauſe.

And beſides, the defendant has forfeited his recognizance, whereby he was obliged to bring down the indictment to trial.

If there be two indictments againſt a defendant for perjury, and *he* takes the records down to trial, he may bring on which of them he pleaſes firſt; but the attorney-general may enter a *nolle proſequi*, and ſo force him to bring on the other; but a defendant cannot in ſuch caſe *withdraw* one of them. 4. Com. Dig. "Indictment" (M.).

And whereas here were two indictments againſt the defendant, and he had brought them down both, and put them into court, he now, to bring which he pleaſed on firſt, withdrew one of them.

HOLT, *Chief Juſtice*, ordered him to put it in again.

And it was inſiſted on, that the queen had her election to bring on which of her cauſes ſhe pleaſed, and therefore they would bring that on firſt which the defendant would have come on laſt.

(*a*) See Williams *v.* Ogle, Stra. 889.
(*b*) See Rex *v.* Partridge, 3. Peer. Wms. 439.
(*c*) Rex *v.* Fenwick, 1. Sid. 153.

But

HOLT, *Chief Juſtice.* It is true, the queen has that election where ſhe brings on her cauſes herſelf, but here the defendant brings it on, and he is to do the firſt act, and therefore has his election; but if you will enter a *non pros.* upon that which they deſire to bring on, you thereby inforce them to bring on the other. But to ouſt all * controverſy, the defendant having put in that which he would prefer firſt, it was firſt called.

THE QUEEN *againſt* CARTER.

* [169]

NOTE, Another exception was, that the record of the original trial began, "MEMORAND. *quod apud* W. *coram domina regina* "*et* JOHANNE HOLT, *Milite, Capitali Juſtic. &c. et ſociis ſuis,* "*&c.*" whereas there is no court ſo ſtyled, but it ought to be *coram domina regina* only.

A miſtaking of the record in which perjury is aſſigned, is fatal.

Muriel *againſt* Tracy, Jenkins, Chamberlain, and Cornwaill.

Caſe 245.

AN ACTION UPON THE CASE in the nature of *a conſpiracy*, wherein the plaintiff declared, that the defendants, *per conſpirationem inter eos habitam* to vex and oppreſs him, did, *prætextu cujuſdam warranti* from SIR SIMON LOVELL, *Recorder of London*, wherein the plaintiff was charged by the oath of one *Aſhby* to have aſſaulted the ſaid *Aſhby* on the highway, with intent to rob and murder him, arreſt him the plaintiff, and carry him before *Chamberlain*, a juſtice of peace, who, *ex perſuaſione* of *Tracy*, refuſed to bail him, though good bail were tendered, and ſo *Chamberlain* committed him to the priſon of THE GATEHOUSE, where ſuch and ſuch ſums of money were extorted from him. But it was not ſaid in the whole declaration that it was without probable cauſe.

If a declaration for a malicious proſecution charge three perſons, one of whom was the juſtice of the peace, with a conſpiracy illegally to arreſt and imprifon the plaintiff, the *conſpiracy* may be collected by the jury from the *circumſtances* of the caſe; but if it appear that the juſtice of the peace was perſuaded by the others that it was not a bailable offence, and that from *ignorance of the laws* and not from the *malice of his heart*, he committed the plaintiff, he ſhall be acquitted.

Upon evidence before HOLT, *Chief Juſtice*, it appeared,

That eight years ago *Muriel*, being a gentleman's ſervant, and riding one day abroad, had fallen out with *Aſhby* on the road, and, being in drink, was ſoundly beat by him; notwithſtanding which, *Aſhby* took out immediately a juſtice's warrant againſt *Muriel* for an aſſault and battery, but nothing more was done upon it. Six years afterwards, ſome difference ariſing between *Muriel*, *Tracy*, and *Jenkins*, here in *London*, *Jenkins* goes down to *Suffolk*, and, at the perſuaſion of *Cornwaill*, prevails with *Aſhby* to come up to *London*, to make the oath abovementioned againſt *Muriel*, which he did before THE RECORDER (whereupon the warrant was granted), and had a guinea from *Jenkins* for his pains. A twelvemonth after, *Tracy*, being himſelf a juſtice of peace, employed the underkeeper of THE GATEHOUSE, and others, to take up *Muriel*, and to carry him before *Juſtice Chamberlain*, and ſend him word as ſoon as they took him, which accordingly was done. And *Tracy* informed *Chamberlain* that he had adviſed with THE RECORDER and other lawyers about the offence charged upon *Muriel*, and that

S. C. ante, 30. S. C. poſt. 178. S. C. 2. Salk. 192. S. C. Holt, 706. Ante, 90. 100. Poſt. 185.

1. Salk. 14, 15. 5. Mod. 349. 405. 1. Saund. 128. 230. 4. Co. 14, 15. 5. Co. 56, 57. 2. Mod. 306. Carth. 417. Skinner, 44. 8. Mod. 45 Ld. Ray, 81. 378.

they

Mubrin against Tracy; Jennins, Chamberlain, and Cornwall.

they were of opinion it was not bailable; whereas in truth he never did ask the question: whereupon *Chamberlain* refused bail and committed him. *Tracy* followed him to gaol, and directed the gaoler to use him severely, and to iron him.

Holt, *Chief Justice*, As to *Chamberlain*, he was to blame for his *ignorance*, but there is no reason to find him *guilty* upon this evidence (*a*): but for the rest, the circumstances of the evidence shew it to be all one chain of malice; and if the declaration were good, the evidence would maintain it.

*[170]

* But the exceptions taken to the declaration were:

If a declaration for a malicious arrest state the warrant to be, "with intent "to rob," and the warrant was, "with intent, "&c. *as he be-* "*lieves*," the

First, That it recited a warrant variant from that on which the plaintiff was arrested; for the recital is absolute and positive that the oath was, that the plaintiff had assaulted *Ashby* with intent to rob and kill him; but the warrant was with intent to rob and kill him, *as he believes*.

No great heed was had to that objection; but Holt, *Chief Justice*, said, it should be saved to them.

variance is immaterial.

A declaration for a malicious prosecution, stating that the plaintiff was arrested "by *pretence* of "a certain "warrant," is good.

Secondly, That the declaration supposed the arrest to be without a legal warrant; for it was, that *prætextu cujusdam warranti*, and *prætextu* was the same as *colore*, and that must be taken as if no warrant had been.

But that was over-ruled; for there being an ill use made of this warrant, though it were legal, sure that were *prætextu* of a warrant.

A declaration for a malicious prosecution, omitting to state that it was without *probable cause*, is bad.

1. Vent. 86.

Thirdly, If it be taken to be a legal warrant, there can be no conspiracy in taking up one by a legal warrant, especially it not being laid that the warrant was taken out without *probable cause*.

Holt, *Chief Justice*, upon this exception, willed them to withdraw a juror, for he held the declaration ill for not alledging it to have been without *probable cause*.

And to this the parties consented.

In an action of conspiracy, *one* may be found guilty, and the other acquitted.—N. B. 277. A. 278. K. 2. Saund. 230. 1. Vent. 12. 18. 23. *et sib.* Ante, 16. Cro. Car. 239. 3. Mod. 220. Stra. 144. 193. 1227. 1. Wilf. 210. 5. Mod. 408. Bull. N. P. 14. 1. Hawk. P. C. ch. 72. f. 8.

Note, Here, by Holt, *Chief Justice*, This being an action on the case in nature of a conspiracy, all might be acquitted to one, and he found guilty.

(*a*) For cases in which the Court has refused to grant *informations* against justices of the peace for ignorance, *vide* Rex *v.* Young, 1. Burr. 556.; Rex *v.* Cox, 2. Burr. 785.; Rex *v.* Palmer, 3. Burr. 1162.; Rex *v.* Jackson, 1. Term Rep. 653.; Rex *v.* Holland, 1. Term Rep. 692.—But if a party be injured by their mistake or ignorance of the law, an action lies, 2. Hawk. P. C. ch. 15. f. 13. Green *v.* Bucclechurch, 1. Leon. 323. They cannot however be punished both *criminally* and *civilly* for the same offence, Rex *v.* Fielding, 2. Burr. 719.

Oliver

Oliver *againſt* Vernon. Caſe 246.

TROVER for fourteen *lemon-trees*, and the ſtatute of Limitations pleaded.

Trover will lie for trees planted in boxes in a garden.

On evidence at *niſi prius*, before HOLT, *Chief Juſtice*, it appeared, that the plaintiff obtained leave from my *Lord Brudenell* above ſix years before to have the trees ſtand in his garden at *Twitenham*, and that his lordſhip's gardener might take care of them; that afterwards *my Lord* ſold his garden, with all his trees therein, to my *Lord Portland*, who afterwards ſold the garden, and whatever he had from my *Lord Brudenell*, to the defendant, and that a demand and refuſal within ſix years was proved upon the defendant.

S. C. Holt, 332. Ld. Ray. 276.

IT WAS OBJECTED, that the gardener, who received the trees firſt from the plaintiff, and continued gardener all along, and looked after and reared the trees, could not be a witneſs; for that he, in caſe he proved a title in the plaintiff, would thereby intitle himſelf to an action for his labour and ſkill employed in rearing up the trees; whereas if it went for the defendant, he was to have nothing.

If a perſon deſire another to let his ſervant take care of goods, the ſervant is a good witneſs for the plaintiff in trover againſt his maſter's aſſignees.

But this was over-ruled by HOLT, *Chief Juſtice*,

FIRST, Becauſe if the gardener took care of them as my *Lord Brudenell*'s ſervant, he was to have nothing for his pains from the defendant.

SECONDLY, If *my Lord* only gave the gardener leave to do it for the plaintiff, the gardener then was ſo far the plaintiff's ſervant, and it * never was doubted but a ſervant was a good witneſs for his maſter.

* [171]

HE ALSO HELD, that theſe trees being in boxes, and ſeparate from the freehold, could not paſs by the grant of *the garden*, nor by the words "all his trees therein," for they were not his trees, that is, my *Lord Brudenell's*. Nay, it would be hard to comprehend them by conſtruction within the grant, if the words had been "all the trees in the garden," without there were a ſchedule of the trees intended to paſs, and the plaintiff's trees mentioned therein.

Trees in a garden do not paſs by a grant of the garden in which they ſtand.

But HE AGREED, if they had been conveyed by my *Lord Brudenell's* grant, that had been *a converſion*, and being above ſix years, the iſſue would be againſt the plaintiff.

And beſides that, the grant of *the garden* was a determination of *the licence* given to the plaintiff, and that the grantee might diſtrain the trees *damage feaſant*; but he having not done ſo, but ſuffered them to continue, was ſo far from *a converſion*, that it was evidence of *a licence* by him.

If *A.* licenſe *B.* to put trees in his garden, and then ſells the garden to *D.* and *D.* continue the trees without ſeizure, it is a *renewal* of the licence. Carter, 218 Cro. Jac. 204. 377.

And he ſaid, that by grant of "all a man's trees," *apple-trees* would not paſs. *Q.*

And the plaintiff had a verdict.

Robiſon

Caſe 247.

Robiſon *againſt* Goſnold.

A husband is liable for *neceſſaries* furniſhed to his wife during her cohabitation with him; or if he turns her out of doors; or if he receive her back after ſeparation; but if ſhe leave him, and live ſeparate, and the perſon has notice of the ſeparation, he is not liable.

A HUSBAND diſcovering his wife to be a very lewd woman, goes away from her, and ſhe, after having lived ſeveral years with AN ADULTERER, was received into the plaintiff's houſe, who entertained her as the huſband's wife.

This action, being an *indebitatus aſſumpſit*, was brought againſt the huſband for lodging and dieting the wife.

HOLT, *Chief Juſtice*, at *niſi prius*, held, that let the woman be ever ſo vicious, yet, while ſhe will cohabit with the huſband, he is bound to provide *neceſſaries* for her, and is liable to the actions of ſuch perſons as furniſh her with them, for his bargain was to take her for better for worſe. In like manner it is if the huſband turn his wife away for her wickedneſs, he remains ſtill chargeable for her neceſſaries. But if the wife leave her huſband, they that truſt her after it is notorious that ſhe has left him do it at their peril, and ſhall not thereupon charge the huſband (*a*).

And he ſeemed to be of opinion, that if a wife had run away from her huſband, and contracted debts, and afterwards the huſband received her, or came after her, and laid with her but for a night, that would make him liable to the debts. Like the caſe where a wife elopes with an adulterer, though ſhe thereby forfeits her *dower*, yet if the huſband will of his own accord receive her again, ſhe ſhall have her dower again (*b*).

S. C. 1. Salk. 119. S. C. Holt, 103. Ante, 147. 2. Salk. 116. 118. 1. Lev. 4. 47. 1. Vent. 42. 2. Vent. 155. 2. Keb. 69. 80. 87. 206. 337. 361, &c. 1. Sid. 109. 485. 1. Bac. Abr. 295. 11. Mod. 241. 12. Mod. 244. 372. 603. Gilb. E. R. 152. Stra. 647. 706. 875. 1214. 1222. Ld. Ray. 444. 1006.

(*a*) *Sed quære*, unleſs the wife have *a ſeparate maintenance*. See Sparrow *v.* Caruther, 2. Bl. Rep. 197.; Hatchet *v.* Baddeley, 2. Bl. Rep. 1195.; Ringſtead *v.* Lanesborough, Cooke's B. L. 3d edit. 32.; Barwell *v.* Brooks, Cooke's B. L. 36.; Corbet *v.* Poinitz, 1. Term Rep. 5.

(*b*) See the caſe of Manly *v.* Scott, 1. Mod. 124. and the caſes cited in the note at the end of that caſe.

* [172]

Caſe 248.

* The Queen *againſt* Coteſworth.

Spitting in the face is a battery. S. C. poſt. 180. S. C. 3. Salk. 191. Ante, 149.

THE INDICTMENT was for a battery upon *Doctor R.* The evidence was, that the defendant ſpit in his face.

HOLT, *Chief Juſtice*. It is a battery.

2. Keb. 545. 1. Mod. 3. Trem. 276. Carth. 280. 491. 1. Bac. Abr. 154.

"*Son aſſault*" may be given in evidence on an indictment. 1. Bac. Abr. 155, 156.

HOLT, *Chief Juſtice*. Though one cannot juſtify a battery by *ſon aſſault demeſne*, by pleading it to an indictment, yet he may give it in evidence upon a *not guilty*, and he may be thereupon acquitted.

Hutton

Hutton *againſt* Manſell.

Caſe 249.

AN ACTION ON THE CASE was brought, laying mutual promiſes of marriage between the plaintiff and the defendant, and a breach in the man, who was in this caſe the defendant.

An action on a promiſe of marriage may be maintained, without proving an *expreſs promiſe* on the part of *the woman.*

Upon evidence, an expreſs promiſe was proved upon the man, but none on the woman's ſide.

HOLT, *Chief Juſtice.* If there be an expreſs promiſe by the man, and it appear that the woman countenanced it, and by her actions at that time behaved herſelf ſo as if ſhe agreed to the matter, though there be no actual promiſe, yet that ſhall be ſufficient evidence of a promiſe on her ſide. And he remembered a caſe in which he had been a Counſel in the time of MONTAGU, *Chief Baron*, where it had been ſo ruled upon evidence againſt his client; and being diſſatisfied then therewith, he put the caſe to eminent men of thoſe times, who all concurred in opinion with THE CHIEF BARON *(a)*.

S. C. 3. Salk. 16. 64. S. C. Holt, 458. 1. Salk. 24. 2 Salk. 437, 438. 553. Ante, 156. 3 Lev. 65. 5. Mod. 411. Stra. 938. Ld. Ray. 386. 12. Mod. 214. 1. Bac. Ab 168.

(a) See the caſe of Harriſon v. Cage and his Wife, Carth. 467. S. C. 5. Mod. 41. S. C. 1. Salk. 24.

TRINITY TERM.

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.*
Sir Henry Gould, *Knt.*
} *Juſtices.*

Edward Northey, *Eſq. Knt. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

---

* Genner *againſt* Sparks.

Caſe 250.

GENNER was a bailiff, and having a warrant for *Sparks* came to his houſe, and finding him in the yard, told him that he had a warrant for him, and pronounced the word *arreſt*, but did not lay his hands on him: whereupon *Sparks* ſnatched up a pitchfork, and kept off the bailiff, threatening to kill him if he came nigher; and thus retreated into his houſe, and ſhut the door againſt the bailiff. Upon all this appearing on affidavit,

An *arreſt* muſt be by corporal ſeizing or *touching* the defendant's body; and therefore if a bailiff only pronounce words of arreſt, and ſhew his warrant, and the defendant eſcape, the Court will not grant an *attachment* for a *reſcue*; for he was not legally arreſted.

S.C. 1. Salk. 79. Ante, 90. 141. Poſt. 210. 1. Mod. 56. 7. Mod. 8. 3. Bl. Com. 288.

CONYERS moved for *an attachment* upon the matter againſt *Sparks*, ſuppoſing this to be *a reſcous*, or at leaſt a great *contempt* of the queen's writ.

But PER TOTAM CURIAM, Here was no *arreſt*, the bailiff having not laid hands on the defendant; for his ſhewing the warrant, and pronouncing the word "*arreſt*," without touching him, was no more an arreſt than it would be one if a bailiff ſees a man look out at a window, a pair of ſtairs or two high, and tells him he has a writ for him, and ſays, that he *arreſts* him; and therefore in ſuch caſes the bailiff cannot break the houſe to come at the perſon, as he could lawfully do if he had been his priſoner, and had eſcaped into a houſe from him.

A bailiff, after an arreſt, may break open doors to ſeize his priſoner. Poſt. 211.

But IT WAS AGREED, that if here he had but touched the defendant even with the end of his finger, it had been *an arreſt*, and he might have broke the houſe afterwards to ſeize upon him (*a*), and *an attachment* might go for *the reſcous*; as if a bailiff have a warrant againſt a perſon who is in a houſe, and lay hand upon * him through the window (*b*), he may afterwards break the houſe to come to him.

* [174]

Skin. 8. Salk. 79. 1. Hale, 459. Ld. Ray. 1028. Foſter, 319. Cowp. 3. 2. Hawk. P. C. ch. 14. ſ. 9. 2. H. Bl. Rep. 120.

A ſheriff's officer is protected by the law in the due execution of his duty. Dougl. 359, 360. 3. Term Rep. 735.

IT WAS LIKEWISE AGREED, that the bailiff had the protection of the law; and therefore if he had ventured on here, and had been killed by the defendant, it had been murder in him (*c*); or if the defendant had beat or hurt him, he might have his action (*d*); or in this caſe, if the defendant were within reach of the bailiff when he pointed the pitchfork at him, he might have his action of aſſault againſt him (*e*); ſo if he had preſented a gun at him at ſuch a diſtance as the ſhot would reach him.

And PER CURIAM, the motion was denied.

(*a*) But a bailiff in execution on *meſne proceſs* may break open the door of a lodger's apartment if he has firſt gained a peaceable entrance at the outer door of the houſe. Lee *v.* Ganſel, Cowp. 1.

(*b*) 2. Roll. Rep. 138. Palm. 53.

(*c*) See 5. Co. 93. 1. Hale, 458. 3. Hale, 117. 470. Ld. Raym. 1028. Foſter C. L. 311. 319. and 1. Hawk. P. C. ch. 31. ſ. 58.

(*d*)

(*e*) See 1. Hawk. P. C. ch. 62. ſ. 1.

Caſe 251.

Barnaby *againſt* Sanderſon.

If the want of an *original* be aſſigned for error, and the defendant appears and alledges *diminution*, and, upon a *certiorari* granted, a *variant original* be certified, yet he may, at *the day given*, ſuggeſt *a right original* of another Term, and have another writ of *certiorari* thereon; but there muſt be previous *notice* to the plaintiff of this ſuggeſtion, and the new *certiorari* muſt be *filed* in the office, or the proceedings will be irregular.—S. C. 1. Salk. 266. S. C. Holt, 275. 1. Salk. 264. 266. Poſt 206. 235. Ante, 113. Skin. 439. to 422. 1. Salk. 144. to 151.

ERROR ON A JUDGMENT in the common pleas, and the want of an original aſſigned for error.

The defendant comes in *ad audiendum errores, gratis*; alledges diminution; and has a *certiorari*. Whereupon *a variant original* is certified; at the day given he comes again, and ſuggeſts *a right original* of ſuch a Term, and prays a new *certiorari* to certify that, and pleads "*in nullo eſt erratum.*"

All this fact appeared on the report of the maſter.

HOLT, *Chief Juſtice*. The defendant is right in point of law; for ſuppoſe the record below be of *Eaſter Term*, and after judgment a writ of error is brought here, and the want of original, or variance in the original, be aſſigned for error, and the defendant alledges *diminution*, the *certiorari* there is only to the *cuſtos brevium* to certify an original of *Eaſter Term*, viz. the Term of which the *placita* are; and if he either certify that there is none, or certify a wrong original, the defendant in error, before *in nullo eſt erratum* pleaded, may ſuggeſt that there is an original of another Term, viz. of *Hilary*, *Michaelmas*, or other Term;

and

and there ſhall go two *certiorari's*; one to the *cuſtos brevium* to certify that original, and another to *the Chief Juſtice* to certify an entry of the continuances: and this has been carried further; for if the *cuſtos brevium* return a wrong original, or a variant one on the firſt *certiorari*, of the Term of which the *placita* are, he may ſuggeſt that there is a right original even of that very Term, and have a new *certiorari*; and when both originals are before the Court, they will intend that to be the right original which agrees with the declaration.

To which all the reſt agreed.

But becauſe, in point of practice, there ought to have been *notice* to the plaintiff of this ſuggeſtion, and the new *certiorari* ought to have been filed in the office, which was not done here, ſo that the judgment by that irregularity was affirmed ſooner than otherwiſe it could have been, THE COURT diſcharged the rule for affirmance of the judgment, and directed the defendant to proceed regularly.

So he was forced to move to have it read as a record again, and have it made *a conſilium* for to come regularly on.

And the judgment was afterwards affirmed PER TOTAM CURIAM.

* The Queen *againſt* Criſp.

Caſe 252.

CRISP was indicted, for that there being an account ſtated between him and *A.* whereby he was indebted, in ſuch a ſum, to *A.* which account he ſigned, he got it into his hands *per falſas et ſiniſtras inſinuationes*, and *vi et armis* tore it, *contra pacem*, &c.

An indictment lies for tearing an account after it is ſigned and ſettled.

Comb. 16. 12. Mod 413. 255. 454. 502. 4. Com. Dig. "Indictment" (D.). Stra. 595. Ld. Ray. 366.

EYRES moved to quaſh it:

FIRST, Becauſe it was a *private offence*, not indictable.

SECONDLY, Becauſe the indictment did not ſhew whoſe the property of the paper was.

But THE COURT denied the motion; for it is *a treſpaſs* now *ab initio*. The property is his, who was intitled to the debt on the account. And they bid him try it, or demur to it at his peril (*a*).

(*a*) But it ſeems now to be ſettled, that an indictment will not lie for a *bare treſpaſs*. Rex v. Johnſon, 1. Will. 325. Sayer, 27. for the words *vi et armis* alone are not ſufficient, Rex v. Storr, 3. Burr. 1698.; Rex v. Atkins, 3. Burr. 1766.; there muſt be ſuch an actual force as implies a *breach of the peace* to make a *treſpaſs* an indictable offence, Rex v. Bake, 3. Burr. 1731.; and this degree of actual force muſt appear on the face of the indictment, Dougl. 153.

Caſe 253.

Anonymous.

When a bill may be filed againſt AN ATTORNEY. Ante, 106.

PER CURIAM. One may file *a bill* againſt AN ATTORNEY any day within the Term; and if there be *four days* of the Term to come, one may ſerve rules upon it that Term: but if the declaration be in *Eaſter Vacation* (*a*), which is indeed a declaration of *Eaſter Term*, the defendant ſhall have *four days* in *Trinity Term* to plead.

2. Salk. 544. 3. Mod. 43. 11. Mod. 2. 12. Mod. 504. Stra. 522, 523. 532. 1192. Tidd, 242. Dougl. 312.

Abatement muſt be pleaded within *four days* of the expiration of the Term in which the declaration is delivered.

And one is not confined to *four days* to plead in *abatement*, but he has the whole Term of which the declaration is delivered; but if he has *four days* in the Term of which the declaration is, he ſhall not plead in abatement the next Term (*b*).

—2. Salk. 515. 517. 519. 1. Salk. 1. Lut 24.

(*a*) See Dodſworth *v.* Bowen, 5. Term Rep. 325.; Waghorn *v.* Fields, 5. Term Rep. 173.

(*b*) A plea in abatement muſt be pleaded before *the rule for pleading* is out, 1. Term Rep. 278. Imp. Practice. 239.; which rule expires in *four days*, Gilb. Rep. 318. after declaration delivered in Term-time, Rule, Trin. Term, 1. *Geo.* 2. 2. Stra. 1192.; and theſe four days allowed for pleading in abatement are both *inclusive*, Jennings *v.* Webb, 1. Term Rep. 277.; and if the laſt of the four days happen on *a Sunday*, the plea muſt be filed on the preceding day, Lee *v.* Carlton, 3. Term Rep. 642.; for if it be filed on the ſucceeding day the plaintiff may ſign judgment, Harbord *v.* Pengal, 5. Term Rep. 210.; and the neceſſity of a rule to plead is ſuperſeded by the defendant's pleading in abatement, Brandon *v.* Payne, 1. Term Rep. 689. If, however, a declaration be delivered in Vacation-time, or within leſs than four days of the end of a Term, the defendant, after *a ſpecial imparlance*, may plead in abatement within the firſt four days inclusive of the next Term as *of the preceding Term*, 1. Bac. Abr. 8vo edit. 27.; but ſuch a plea can only be received in ſuch caſe after a ſpecial imparlance, Doughty *v.* Laſcelles, 4. Term Rep. 520.; and it muſt be *filed* within the four days, for *the delivery* of it only within that time is not ſufficient, Imp. K. B. 240.—And by 4. & 5 *Anne*, c. 16. "No *dilatory plea* ſhall be received, "except the party offering ſuch plea do "by affidavit prove the truth thereof, or "ſhew ſome probable cauſe to the Court "to induce them to believe that the fact "of ſuch plea is true."—See 5. Com. Dig. "Pleader" (D.).

Caſe 254.

Croket's Caſe.

In *aſſumpſit*, if the declaration be delivered of *Eaſter Term*, the Court will not in *Trinity Term* change the *venue* from *Staffordſhire* to *London*, upon the common affidavit, without the *uſual affidavit* of the time when the declaration was delivered.

ASSUMPSIT. The *venue* was laid in *Staffordſhire*, and the declaration was of *Eaſter Term*.

CHETHAM moved to change *the venue* into *London* upon the *common affidavit*; but had no affidavit, as the uſual courſe is, of the time of which the declaration was delivered.

HOLT, *Chief Juſtice*. The reaſon of that courſe is, becauſe if the action were laid in *London* or *Middleſex*, perhaps, by the rules of the court, the plaintiff would have a plea to enter; and therefore it is neceſſary to ſatisfy the Court that the declaration was not delivered ſo long ago as that the plaintiff could be intitled to a plea to enter, to obtain the change of *the venue*: but this being a country cauſe, and the declaration of *Eaſter Term*, in which caſe,

S. C. 2. Salk 669. Stra 211. 1. Com. Dig. "Action" (N. 13.).

though

though it were delivered the firſt day of the Term, he could not have a plea to enter, he thought this out of the reaſon of the rule, and therefore an affidavit unneceſſary. CROKET'S CASE.

But here, becauſe if the action were laid in *London*, there muſt be fifteen days between the *teſte* and the return of proceſs, and ſo the plaintiff could have no trial till *Michaelmas Term*,

THE COURT held him up to the rule.

* Oates *againſt* Bromhill. Caſe 255.

Eaſter Term, 3. Anne, Roll .

THE CASE coming on in *the paper* this Term, BROTHERICK inſiſted very much, that the words of the condition in the ſubmiſſion, "SO AS the ſaid award be made, and ready to be "delivered, and given up to the ſaid parties, or ſuch of them as "ſhould deſire it," were of ſome uſe, and put in for ſome purpoſe, and muſt be intended of another delivery than the bare pronouncing of the award: and yet if, according to *Dyer* (*a*), "ready to be "delivered" be only to be pronounced or declared by an oral delivery, the adding thoſe words in the condition would ſignify nothing; for then, as ſoon as it is made by the arbitrators, it is ready to be declared or pronounced by them; and he inſiſted on the caſe of *Wood v. Ardiſt*, in the common pleas, in *Trinity Term*, in the firſt year of *Queen Anne* (*b*), where the condition of the ſubmiſſion was in the very ſame words as here, and a *parol award* ſet out as here, and adjudged on demurrer to be ill PER TOTAM CURIAM, notwithſtanding the caſe in *Dyer* had been urged; the report of which caſe he had from *Tracy*, one of the Judges of the court, and THE ROLL whereof he had peruſed.

On a ſubmiſſion to arbitration, "ſo as the "award be "made, and "ready to be "delivered, "&c." *a parol award* is good.

S. C. ante, 160. S. C. 1. Salk. 75. S. C. Holt, 82. Ld. Ray. 115. 247. 533.

But PER TOTAM CURIAM, Upon great conſideration, notwithſtanding the ſaid late caſe in the common pleas, a *parol award* is capable of a delivery, *viz.* a declaration of it to the parties, or either of them, if they deſire it; and that being ſo, as ſoon as the arbitrators have agreed on the award, it is ready to be delivered; and the readineſs of delivery needed not to have been averred, becauſe the alledging an award made imports it: nor is the condition in the ſubmiſſion therefore vain; for if, after the award made, the parties, or either of them, had come and aſked the arbitrators what award they had made, and they had refuſed to tell, then he might plead that it was not ready to be delivered, ſhewing that matter: ſo perhaps, if the arbitrators had died in ſo ſhort a time after the award made that the party could not have had convenient time to aſk them; for the intent of the condition was, that the parties ſhould have notice of the award.

(*a*) Dyer, 218. (*b*)

Averment that an award was *ready to be delivered* is good, without saying *to both parties.*

ANOTHER MATTER he inſiſted on was, that *the averment* was, that "the award was ready to be delivered to them both," without ſaying, "and either of them;" for it may be, the arbitrators were ready to declare it to both of them if they had come together, but not to one of them.

1. Com. Dig. "Arbitrament" (I. 6.). Ld. Ray. 115. 247. 538.

PER CURIAM. It is not eſſential to a *parol award* that it ſhould be notified to both parties.

An award ordering "the "ſaid *A.* to pay "to the ſaid *B.* "the ſaid ſum "of 10l." is good, though no ſum of 10l. was mentioned before.

HE ALSO OBJECTED, that in the award ſet out it was ordered, that "*præfat. A.* (for the purpoſe), one of the parties, *ſolveret* "*præfat. B.* the other party, *præd. ſummam* of ten pounds," and there was no ſum of ten pounds mentioned before.

* [177]

Vide 2. Vent. 242. 3. Bulſt. 311.

IT WAS AGREED, that "*præd.*" could not, without a tautology, be applied to *Bromhill* the party, becauſe of the word "*præfat.*" before given him; yet becauſe in ſenſe it could not be applied to *ſummam*, there being no *ſum* mentioned before, THEY ALL AGREED, that they would make a comma after *præd.* and ſo join it to *the party*, * rather than ſuffer it to go to *ſummam* to vitiate the award; and where a *præd.* may refer in good ſenſe to either of two antecedents, there it may vitiate, becauſe of incertainty; but where it has but one thing to refer to, and joining it to that would make it nonſenſe, it ſhall be rejected as idle.

And BY THE WHOLE COURT, judgment was given for the plaintiff.

Caſe 256.

Fazakerly *againſt* Baldoe.

On a return to a *habeas corpus*, grounded on a *cuſtom of London*, the Court will firſt order the return to be *filed*, for the purpoſe of controverting the *cuſtom* in an action for a *falſe return.*

UPON a return of a *habeas corpus* from *London*, a bye-law was ſet forth, laying a certain penalty upon any freeman that ſhould ſell goods uſually ſold by weight, not having weighed them; by THE CITY BEAM (*a*), grounded upon ſuch a cuſtom in *London.*

PARKER and EYRE now moved to have the return filed, for that, without it was filed, the defendant could not bring an action of *falſe return*, and then there would be no way to controvert the being of ſuch a cuſtom; ſo they might return what cuſtom they pleaſed, *falsè et impunè.*

A *procedendo* may be granted to the mayor's court of *London* after *the return* to a *habeas corpus* (brought by a perſon committed for non-payment of a penalty under a bye-law of the city) has been *filed* in the ſuperior court, although the uſual practice is, to award the *procedendo* without filing the *return*. 2. C. 1. Salk. 352. S. C. Holt, 322. 335. Ld. Ray. 498.

And as to the objection, that after the return filed there could not be *a procedendo*, they anſwered,

FIRST, That true it is, a record once filed in that court ſhall never be ſent back; but that is to be underſtood in another Term, but in the ſame Term it comes in it may (*b*).

(*a*) See Cuddon *v.* Provoſt, ante, 123. (*b*) 1. Lev. 93. 1. Roll. Rep. 85.

SECONDLY,

SECONDLY, Though it were true, that a record once filed here could not be ſent back the ſame Term, yet, this being a return of a *habeas corpus*, which removes not the record, nor any of the proceedings below, but only certifies a hiſtory or tenor of the record, the filing thereof cannot hinder the Court from awarding a *procedendo* to enable them to proceed below *(a)*. And if the plaintiff would proceed here above, he muſt begin *de novo* with a new bill againſt him *in cuſtodiâ mareſchalli (b)*.

FARATRIA *againſt* BALLOON.

HOLT, *Chief Juſtice*. The practice has always been in this court to award a *procedendo* without filing the return. But the queſtion is, Whether the filing the return will be a hindrance to our granting a *procedendo*? It is true, that by *habeas corpus* all proceedings below are ſuſpended until the Court has determined of the right of the cauſe of detainer upon the return; and if they had proceeded below in the mean time it would be all void, and *coram non judice*; ſo that it will be neceſſary to award a *procedendo* to untie their hands below: but why we may not grant a *procedendo* after the return filed I cannot ſee; for there is a difference in this reſpect between a *habeas corpus* and a *certiorari*: upon a *habeas corpus* we have not THE RECORD itſelf here as we have upon a *certiorari*: and where a record is removed hither, and filed here, it ſhall never be ſent back, not even in the ſame Term, in any caſe whatever, except in the caſe of *felony*; and that by the ſtatute of 6. *Hen.* 8. c. 6. whereby if one remove * his indictment for felony up hither, we may remand him back after it is filed, to the county where it is to be tried by the Judges of gaol delivery there. If we grant a *habeas corpus* to bring up a priſoner charged criminally from NEWGATE, and the return is filed, yet, if we adjudge the return good, we remand the priſoner; and the juriſdiction of the Judges of gaol delivery, which is ſuſpended by the *habeas corpus*, is revived by the remanding him back. But upon a writ of error of a fine, the very fine is never certified hither, but only a tranſcript of it (*c*); and if the Court adjudge it erroneous, they ſend a *certiorari* to THE CHIROGRAPHER to certify the fine itſelf, and it is actually cancelled here.

* [178]

And after they had taken time to conſider, PER CURIAM it was filed, and a *procedendo* awarded (*d*).

(*a*) 1. Keb. 170.

(*b*) See Davis *v.* James, 1. Term Rep. 372. Tidd's Pract. 184.

(*c*) See S. C. 1. Salk. 341.

(*d*) But, except upon returns from the city of *London*, the Court will not enter into the conſideration of the validity of a bye-law upon the return to a *habeas corpus*, Ballard *v.* Bennett, 2. Burr. 777.

The Queen *againſt* Foxby. Caſe 257.

FOXBY was convicted by the juſtices of peace at their quarter-ſeſſions at *Maidſtone*, upon an indictment for being *a common ſcold*, and judgment that ſhe ſhould be *ducked*: whereupon ſhe

To a *writ of error* on a judgment for being a *common ſcold*, the defendant muſt aſſign error in perſon.—S. C. ante, 12. S. C. poſt. 213. 239. S. C. 1. Salk. 666. S. C. Holt, 274.

brought

THE QUEEN *againſt* FOXBY.

brought *a writ of error*, having obtained *a warrant* for that purpoſe from THE ATTORNEY GENERAL (*a*); and hereupon the ſheriff let her go at large, there being no fine or impriſonment in the judgment.

PER CURIAM. She muſt aſſign error in perſon.

The way to bring *error* upon an indictment. 2. Salk. 149. Stra. 849, 1246.

NOTE, The moſt uſual way of bringing *writs of error* of judgment upon *indictments* is, to remove the record into THE CROWN OFFICE by *certiorari*, and then bring A WRIT OF ERROR *coram nobis*; but one may directly remove it by *writ of error*; and either way is good.

Manner of bringing error on an *indictment*. 1. Vent. 53.

But, after *writ of error*, the courſe is, to ſerve a rule in THE OFFICE to aſſign error; and, if they fail, to have a peremptory rule, which muſt be upon motion; and upon default in that, to nonſuit them upon the *writ of error*, and award execution.

(*a*) See upon this ſubject Rex *v.* Wilkes, 4. Burr. 2550.

Caſe 258. The Queen *againſt* Tracy.

If an indictment for a conſpiracy againſt ſeveral, charge the acts of ſome of the defendants in the pariſh of *St. Giles* in *Middleſex*, and of the others in the pariſh of *St. Margaret's* in the ſame county, and a *venue* be awarded to *St. Giles's* only, it will be a *miſtrial*, for the jury ought to come from *both* the pariſhes.

TRACY was again indicted, for that he, together with *Taylor* and *Jeoffreys*, with intent to oppreſs *Muriell*, *falsò*, *nequiter*, *&c.* did at the pariſh of *St. Giles'*, in the county of *Middleſex*, get *Muriell* arreſted, by pretext of a certain warrant from THE RECORDER OF LONDON, reciting the ſubſtance thereof, as before; and that after he was arreſted, they brought him before CHAMBERLAINE, juſtice of the peace, in the pariſh of *St. Margaret's*, in the ſaid county; and that *Tracy* did there, with farther intent to oppreſs him, falſely, maliciouſly, &c. perſuade the ſaid *Chamberlaine* to refuſe bail for him, though ſufficient bail was then tendered to him, and procured him to refuſe the ſaid bail, and to commit him to jail; and avers the refuſal of bail and commitment; and likewiſe that *Tracy* did perſuade and procure *Taylor* and *Jeoffreys* to lay him in irons, and uſe him ſeverely; and that they did threaten to iron him, and by that means extorted five pounds from him.

* [179]

He * having entered into *a recognizance* to try this indictment, the *venire* was made from the pariſh of *St. Giles's* only.

S. C. ante, 30. 114. 169. S. C. 3. Salk. 192. S. C. Holt, 706.

And after verdict and conviction, IT WAS HELD *a miſ-trial*; for here being ſeveral facts ariſing in ſeveral pariſhes, *the venue* ought to come from both (*a*), and ſo judgment could not be given upon the indictment.

A recognizance conditioned to try an indictment, is forfeited, though there be a trial, if the verdict is quaſhed for a defect in the *venire facias*.—1. Roll. Abr. 433.

But THE COURT held, that he had forfeited his *recognizance*, for he had not tried the indictment, for it muſt be a trial with effect on which the Court may proceed to judgment; for if we do not eſtreat the *recognizance*, every defendant will wilfully make

(*a*) See Scott *v.* Breſt, 3. Term Rep 238.

faults,

faults, ſo that they ſhall always go unpuniſhed. And we may award a *ſcire facias* upon the recognizance here in this court, and determine it ourſelves, or have it eſtreated into THE EXCHEQUER. THE QUEEN *againſt* TRACY.

And a new *venire facias* was directed, and the defendant forced to give a new recognizance, or he muſt have gone to jail. If a *venire de novo* be granted on an indictment after a *miſ-trial*, the defendant muſt enter into a new *recognizance*.

NOTE, Here it was ſaid, that it being a fact in *Middleſex*, the *venue* might be made returnable *de die in diem*, and it being quaſhed, they might date the new *venue* on the day of return of the firſt. How a *venire* may be *dated* and *returned* in *Middleſex*.

TRACY being again convicted upon a new *venue*,

IT WAS NOW MOVED *in arreſt of judgment* by EYRE, that here was no offence in the indictment. If a perſon procure another to be arreſted, and maliciouſly perſuade the juſtice to refuſe his bail, and the gaoler to extort money from him for fees, it is an *indictable* offence; although the original arreſt was by virtue of a *legal warrant*.

FIRST, The taking a man up by virtue of a lawful warrant is lawful, and cannot be maliçious, or with ill intent, and quoted *Rex v. Elliot*, *Cro. Car.* 608. (*a*).

SECONDLY, As to the other part, *viz.* perſuading *Chamberlaine* to refuſe bail, was only his opinion, which though falſe, yet it is not puniſhable.

And THIRDLY, As to the extortion in jail, it did not appear to have been by his direction.

But PER CURIAM, If a man get another wrongfully put in jail, and there the keeper extort money from him, he that wrongfully put him in, is guilty of the oppreſſion of taking the money. If a man falſely impriſon *J. S.* and the jailor detain him until he pay ſo much money, he ſhall have his action of falſe impriſonment, and taking ſo much money from him againſt ſuch perſon: ſo here, though the warrant be legal, yet if one, with intent to oppreſs a man, get him taken up by this warrant, and follow him to a juſtice of peace to hinder his being bailed, it is illegal; for it is illegal to uſe a lawful means for oppreſſion: It is an offence in a juſtice of peace to refuſe bail in caſe of a *common miſdemeanor* (*b*). And it ſuffices to ſay in the indictment, that ſufficient bail was tendered; without ſaying, that the party knew them to be ſufficient.

AND HERE it was ſaid, that *Tracy* perſuaded *Chamberlaine* to commit him, and that he did commit, without ſaying, that it was *ſuper inde*; yet it was held well. An indictment for perſuading *A.* to commit *B.* is good, without ſaying, he was *thereupon* committed.

(*a*) 2. Hawk. P. C. ch. 13. ſ. 11. "Bail," (F. 3.)
(*b*) Hale Sum. 98. 1. Com. Dig.

Anony-

Case 259.

Anonymous.

Sheriff cannot *bail* on an arreſt formiſdemeanor.

HOLT, *Chief Juſtice*, If one be taken into cuſtody by *a proceſs* from THE SESSIONS to the ſheriff, he muſt give *a bail-bond* according to the ſtatute of 23. *Hen.* 6. c. 9. (*a*).

One juſtice may bail when *one* may grant warrant.

And where-ever one may be taken up by warrant of one juſtice, any one juſtice may bail (*b*).

Juſtices may *commit* or *bail* in caſes of *miſdemeanor* before *indictment* found.

8. Mod. 80.

Formerly indeed none could be taken up for *a miſdemeanor* until indictment found, but now the practice over all *England* is otherwiſe (*c*). And PER HALE (*d*), That practice is become a law, and juſtices of peace *eo ipſo* may bind to the peace, and over to the ſeſſions, for any *breach of peace* before an indictment found.

(*a*) But it is decided in a late caſe, that the ſheriff has no authority to take *a bond* for the appearance of perſons arreſted by him under proceſs iſſuing upon an indictment at the quarter-ſeſſions for a miſdemeanor; he can only take *a recognizance* for their appearance. Bengough *v.* Roſſiter, 4. Term Rep. 505. for whatever power the ſheriff might have had in this reſpect under the ſtatute 23. *Hen.* 6. c. 9. it was taken away by the 1. *Edw.* 4. c. 2. 2. Hawk. P. C. c. 15. ſ. 27.

(*b*) Hale's Sum. 105. 1. Com. Dig. "Bail" (F. 4.)

(*c*) 2. Hawk. P. C. ch 13. ſ. 11.

(*d*) 2. Hale's P. C. 108.—See alſo 4. Bl. Com. 287.

Caſe 260.

* The Queen *againſt* Weſt.

An order of *ſeſſions* made on the examination of *one juſtice*, is bad, although *two juſtices* make the adjudication; for the examination is a *judicial act*, and both muſt be preſent.

8. C. 11. Mod. 59.
S.C. 2. Ld. Ray. 1157.
1. Salk. 73.
2. Salk. 477. 488.
5. Mod. 322.
And. 238.
Burr. S.C. 737.
2. Bac. Abr. 329.
Ld. Ray. 55. 1098.

AN ORDER of two juſtices recites, That WHEREAS oath was made before *one* of them by the mother of a baſtard, that *B.* was the father of it; and that by examination of her by *one* of them, it did appear that *B.* was the father, therefore *they* adjudge him to be ſo, and order him to pay ſo much.

PER CURIAM. The examination is a *judicial act*, and ought to be by *both*; and it is not enough that one of them ſhould examine, and make a report to the other; but if they be both preſent, and one alone examine, that will be well; for there the examination of one is the examination of the other (*a*).

And by HOLT, *Chief Juſtice*, Where two juſtices of the peace are ready to bail one, they ought to be both preſent to do it; and it is not enough that one of them ſhould firſt ſign the recognizance, and then ſend it to another, though the contrary be ſometimes irregularly practiſed.

And here the order was quaſhed; and the party bound over to appear at the next quarter-ſeſſions.

(*a*) See Billings *v.* Prim, 2. Bl. Rep. 1018. in point. So an order of removal, Rex *v.* Wykes, 2. Stra 1092. An appointment of overſeers, Rex *v.* Forreſt, 3. Term Rep. 38. An aſſent to the indenture of a pariſh apprentice muſt be by *two* juſtices, Rex *v.* Hamſtall Ridgware, 3. Term Rep. 380. But an order of removal ſigned by two juſtices ſeparately, and in different counties, is only voidable, not void, Rex *v.* Stotfold, 4. Term Rep. 596.

NOTE;

NOTE, The party muſt be preſent in court in this caſe, when the motion is made for quaſhing the order.

The *reputed father* muſt be preſent on motion to quaſh an *order of filiation*.—2. Salk. 475.

Anonymous. Caſe 261.

BY HOLT, *Chief Juſtice*. The *martial law* is not a fixed, but a tranſitory law, variable by THE GENERAL, as occaſion and circumſtances require, according to THE ARTICLES OF WAR (*a*).

MARTIAL LAW is *tranſitory*. Vide Gazette, May 24, 1718.

(*a*) See the caſe of Grant *v.* Sir Charles Gould and Others, 2. H. Bl. Rep. 69.

The Queen *againſt* Coteſworth. Caſe 262.

MONTAGUE took exception to the caption of an indictment, that it was preſented "*per juratorꝰ electiꝰ triatiꝰ juratiꝰ et onerat' ad inquirend' pro dominâ reginâ et corpore com'*," inſtead of *pro corpore com'*.

The caption of an indictment is good, although not ſaid "*for* the "body of the "county." S. C. ante, 172. S.C. 3. Salk. 191. 2. Hawk. P. C. ch. 25. ſ. 126.

Which was agreed PER CURIAM to be the right way: BUT THEY HELD it well notwithſtanding; for it is good ſenſe that they were "charged to inquire for the queen, and in behalf of the "county."

Anonymous. Caſe 263.

BY HOLT, *Chief Juſtice*. Let it be A RULE for the future, that when one is brought up by *habeas corpus*, the return remain in court, and a copy of it only given to THE MARSHAL; and ſo of *a committitur*.

Returns of *habeas corpus* to remain in court.

Anonymous. Caſe 264.

PER CURIAM. If an *excommunication* in the plaintiff be tendered for plea in *abatement*, though it be ſigned by COUNSEL, yet by the courſe of court it is not to be received unleſs it be produced under SEAL, though the plea need not mention that it is ſo produced: and ſo of *an outlawry*.

Excommunication and *outlawry*, when pleaded, muſt be produced under SEAL.

* Jenkins and his Wife *againſt* Plombe. Caſe 265.

Eaſter Term, 3. Anne, Roll

THE COURT having taken time until this Term to conſider of the caſe, declared unanimouſly, that in this caſe the defendant ought to have coſts; upon this ground aſſigned by HOLT, declaring, that the defendant was indebted to them *as executor* of *A. B.* for ſo much money received by him to their uſe as executor, if the plaintiffs are *nonſuited*, they ſhall pay *coſts*.—S. C. ante, 91. S. C. 2. Salk. 207. S. C. 3. Salk. 105. S. C. Holt, 313. S. C. 11. Mod. 174. Carth. 254. 297. 386. 3. Mod. 108. 10. Mod. 276. 11. Mod. 135. 174. 256. 12. Mod. 440. 1. Barnes, 90. 103. 116. 2. Barnes, 99. 106. 122. 2. Ld. Ray. 224. 443. 2. Ld Ray. 865. 1308. 1371. 1413. 1. Stra. 188. 982. 2. Stra. 871. 977. Comy. Rep. 162. 3. Peer Wms. 347.

On an *indebitatus aſſumpſit* brought by huſband and wife, executrix,

Chief

JENKINS AND HIS WIFE *againſt* PLOMER.

Chief Juſtice, that if the plaintiff, having married *the executrix*, had ordered, as he might have done, *J. S.* to receive this debt which was due to the teſtator, and he had accordingly received it, that had been a good payment and diſcharge of the firſt debt; and *J. S.* would now become indebted to the plaintiff by a contract in the plaintiff's time, *viz.* the appointment and receipt; and he in that caſe might bring an *indebitatus aſſumpſit* againſt *J. S.* for ſo much money received to his uſe *as executor:* and here, though the defendant received the money without any previous appointment of the plaintiff, yet the plaintiff, by bringing this action, having aſſented to the receipt, it amounts to an appointment, and a diſcharge of the firſt debtor, and makes a contract between the defendant and him: and here the plaintiff needed not have named himſelf executor, it being upon a contract with himſelf: his ſaying that it was to his uſe as executor, is true, and therefore no harm, but rather better, for it ſhews how the right came; for if here he had been *an adminiſtrator* inſtead of *an executor*, and declared as ſuch and recovered, and then adminiſtration had been revoked, the defendant would be relievable by *audita querela*. And it is a true rule, that where the executor need not name himſelf executor, he ſhall pay coſts upon *a nonſuit*, and the naming himſelf executor ſhall not exempt him from it: and where an executor recovers in a caſe in which he need not name himſelf exeeutor, and dies inteſtate, or makes his executor, who will not prove the will, as to the firſt teſtator's goods, his executor or adminiſtrator, and not the adminiſtrator *de bonis non* of the firſt teſtator, ſhall ſue execution, and would be liable to the *coſts* of a nonſuit of him, and not the adminiſtrator *de bonis non:* and though here the executor ſhould bring the action in his own name, yet the debt recovered are *aſſets* in his hands. If an executor live at *London*, and the goods which the teſtator died poſſeſſed of are at *Briſtol*; yet the executor has ſuch immediate poſſeſſion of them, that he may maintain *trover* for them in his own name againſt any converter of them, and the damages recovered ſhall be *aſſets* in his hands; but if he do not recover ſo much in damages as really the goods were worth, and that happens not through any fault of his, he ſhall anſwer for no more than he recovers; as if the goods be periſhable goods, and before any default in him to preſerve them, or ſell them at due value, they are impaired, he ſhall not anſwer for the firſt value, but ſhall give that matter in evidence to diſcharge himſelf: but if one take goods out of his poſſeſſion, he muſt ſue him that took them, to have an opportunity of diſcharging himſelf of anſwering more in *aſſets* than he recovers: ſo if an executor will omit to ſell the goods at a good price, and afterwards they are * taken from him, there the value of the goods ſhall be aſſets in his hands, and not what he recovers, for there was a default in him. And in this caſe, if the receipt was by the defendant after the plaintiff's marriage with the executrix, *the huſband* alone ſhould have brought the action; but if the receipt were in the wife's time, before the

* [182]

1 Salk. 116, 117.

the marriage, the *husband and wife* ought to join in the action. JENKINS AND HIS WIFE *against* PLOMER.

So PER TOTAM CURIAM, the defendant must have costs (*a*).

(*a*) See Bull *v.* Palmer, 1. Freem. 424. Nicholas *v.* Killigrew, 1. Ld. Ray. 436. Cockerill *v.* Knyston, 4. Term Rep. 277. and Goldthwayte and his wife executrix *v.* Petree, 5. Term Rep. 234. where the law of this case is confirmed.

Anonymous. Case 266.

PER CURIAM. If cause of action arise part in one county and part in another, the plaintiff has election in which of the counties to lay it (*a*), and in that case the defendant shall not upon *the common affidavit* change it. If a cause of action arise part in one county and part in another, the *venue* may be laid in either.—Dyer, 38. 40. 338. 7. Co. 2. 1. Lev. 114. Cro. Car. 20.

But where the cause of action is *transitory*, and the plaintiff lays it in another county than in that in which it did in truth arise, and the defendant by *the common affidavit* would change it into a different county, the plaintiff shall not come and say that it did arise in another county, and be bound to give evidence there (*b*). In what case the *venue* may be changed. 1. Vent. 27.

(*a*) See Patterson *v.* Scott, Stra. 776. and Scott qui tam *v.* Brett, 2. Term Rep. 238.

(*b*) The *venue* may in general be changed in any transitory action, on motion grounded on an affidavit that the cause of action, if any, arose in a different county, and not in the county in which the *venue* is laid; but the rule to shew cause for this purpose may be discharged on motion, the plaintiff undertaking to give material evidence in the county where the *venue* is laid; and if, on the trial, he do not give such evidence, he will be non-suited. 1. Com. Dig "Action," (N. 13.) Mr. Kyd's Edition, where all the cases upon this subject are collected. Foster *v.* Taylor, 1. Term Rep. 782. Watkins *v.* Towers, 2. Term Rep. 275. Allen *v.* Griffiths, 3. Term Rep. 495.

The Queen *against* Daniel. Case 267.

PER TOTAM CURIAM. This Term, the indictment is naught. An indictment will not lie for inticing an apprentice to leave his service. Pop. 135. 2. Rol. Ab. 75. Skinner, 11.

FIRST, The inticing *an apprentice* or *a servant* to depart from his master, is not an offence of a *publick nature*, but the party's remedy is by an *action upon his case*, which he may well maintain (*a*).

SECONDLY, A common *action of trespass* will not lie for inticing an *apprentice* or *servant* from his master. But if one will take away my servant or apprentice by *force*, trespass will lie for the master, declaring upon the force, *per quod servitium amisit* (*b*). *Trespass* lies for taking a servant from his master. S. C. ante, 99. S. C. post. 289. S. C. 1. Salk. 380. S. C. 3. Salk. 191. S. C. Holt, 346. S. C. 2. Ld. Ray. 116.

THIRDLY, Here it does not appear whether he was *a servant* or *an apprentice*, and a manifest difference is taken in 21. *Hen.* 6. *pl.* 23. between a servant and an apprentice. An apprentice must be by deed, a servant may be by parol contract. An apprentice cannot be discharged but by deed, but a servant may be discharged by parol. There is a difference between *a servant* and *an apprentice*.

(*a*) See Cowp. 55.

(*b*) See Reavley *v.* Mainwairing and Walker, 3. Burr. 1306. and Hart *v.* Aldridge, Cowp. 54.

FOURTHLY,

Venue.

FOURTHLY, The inticing to embezzle his maſter's goods has no *venue* to it, and therefore that is bad.

An indictment for procuring a ſervant to leave his maſter, muſt aver that he did leave him.

FIFTHLY, By POWELL, *Juſtice*, "Procuring to depart and "abſenting himſelf from his maſter's ſervice," is bad, without poſitively averring that he did depart.

—4. Com. Dig. "Indictment," (G. 3.)

An indictment for abſenting from ſervice muſt aver how long abſent.

SIXTHLY, by POWYS, *Juſtice*, It ought alſo to appear how long the abſence or departure continued; for here, for aught that appears, it might be but for half an hour.

An indictment for being "a "*common procurer*," is bad.

And PER OMNES, The precedent in *Raſtall* is perfect nonſenſe; for it was, that the defendant procured his ſervant to leave him, and that he was "a *common procurer* of ſervants."

Poſt, 311. 1. Mod. 71. 2. Keb. 24. 687. 2. Sid. 280. 7. Mod. 52. 1. Salk. 382. See 4. Com. Dig. "Indictment," (G. 3.)

* [183]

Caſe 268.

* Grant *againſt* Southers, Marſhal of the King's Bench.

A priſoner ſuffered voluntarily to eſcape by one MARSHAL, may, on a voluntary ſurrender, be lawfully detained by his ſucceſſor.

Ante, 113.

GRANT had been in cuſtody of the former MARSHAL, and voluntarily ſuffered to eſcape by him. *Grant* afterwards came voluntarily and returned, and being found in cuſtody by the ſucceeding MARSHAL, was detained by him.

Whereupon *Grant* brought an action of falſe impriſonment.

THE COURT granted an *imparlance* until the next Term, affirming at the ſame time that it was lawful to detain him, and that to ſuffer him to go at large would be an eſcape in the ſecond MARSHAL; and that HALE, *Chief Juſtice*, had been of the ſame opinion (*a*).

(*a*) HOBART, *Chief Juſtice*, was of opinion, that if a ſheriff ſuffered a priſoner voluntarily to eſcape, and he returned again, and remained in gaol until a new ſheriff was appointed, an action would not lie againſt the new ſheriff for a new eſcape from his cuſtody, becauſe the execution was utterly diſcharged by the firſt eſcape, Caſe of the Sheriff of Eſſex, Hob. 202. But in the caſe of James v. Peirce, this caſe is denied to be law. And it is held by HALE, *Chief Juſtice*, that if a perſon in execution be voluntarily permitted by the Warden of the Fleet to eſcape, and he ſurrender, and then a new warden is appointed, and he again eſcapes, an action of debt will lie againſt the new warden for this eſcape. 2. Lev. 132. If a ſheriff die, his ſucceſſor is bound to take notice of all the priſoners that were in his cuſtody, Weſtly's Caſe, 3. Co. 71. and until a ſucceſſor be appointed, this obligation falls upon the under ſheriff, 3. Geo. 1. c. 15. §. 8. By 20. Geo. 2. c. 37. "All ſheriffs ſhall, "at the expiration of their office, turn "over to the ſucceeding ſheriff, by INDENTURE and ſchedule, all writs and "proceſs unexecuted;" and, by the common law, 3. Co. 71. all the priſoners in his cuſtody with their reſpective executions, Cro. Eliz. 366. A ſheriff therefore is not liable for an eſcape unleſs the priſoner has been regularly delivered to him by the former ſheriff, 2. Barnes, 259. Cro. Eliz. 366. or legally arreſted by his own officers, De Morander v. Dunkin, 4. Term Rep. 120. or be in cuſtody by regular ſurrender, Watſon v. Sutton, 1. Salk. 272. but the voluntary return of a priſoner before action brought, is equal to a re-taking upon freſh purſuit, Bonafous v. Walker, 2. Term Rep. 126. but after a voluntary eſcape, the ſheriff cannot retake a priſoner, Atkinſon v. Jameſon, 5. Term Rep. 25. See alſo Aſkept v. Eyles, 2. H. Bl. Rep. 108.

And

And THE COURT declared that they knew no ſuch thing as *a perpetual imparlance*, though they had known *perpetual injunctions*.

The Court may grant imparlances perpetually, for the ends of juſtice.

The Queen *againſt* Steer and Others. Caſe 269.

STEER and others were indicted, for that at ſuch a place in the county of *Suffolk*, *vi et armis*, in the defendant's pond *illicitè et injuſtè piſcerunt cum retibus*, and ſo many CARPS, *de bonis et catallis* of the proſecutor, did take and carry away.

An indictment lies for fiſhing in another's private pond, and taking and carrying away ſo many *carps*, the *goods and chattels* of the proſecutor.

S. C. 3. Salk. 189. 291. 2. Keb. 178. 594. 2. Salk. 637. 3. Mod. 97. Ld. Ray. 239.

BROTHERICK moved to have the indictment quaſhed,

FIRST, For the inſenſibility of the word *piſcerunt*.

SECONDLY, For that theſe being fiſh in a pond, they could not be *bona et catalla* of any perſon.

PER CURIAM. The inſenſibility of the word "*piſcerunt*" would not have vitiated, had the taking and carrying away of the fiſh been well laid. If a man has a cloſe pond in which there are fiſh, he may call them *piſces ſuos* in an indictment, or he may not do it, at his pleaſure, and either way is good; becauſe being in a cloſe pond, the property *ratione loci* in them cannot be loſt, becauſe they cannot ſwim away; but notwithſtanding he cannot call them as *bona et catalla*, if they be not in trunks; and for that the indictment is bad, but however not fit to be quaſhed on motion, the offence of fiſhing in other men's ponds, and taking away their fiſh, being too great to receive ſo much countenance (*a*).

(*a*) See the ſtatute 5. *Geo.* 3. c. 14. 1. Hawk. P. C. Appendix the Third.

TRINITY TERM,

The Third Year of Queen Anne,

AT

The Sittings at *Niſi Prius*,

BEFORE

Sir John Holt, *Knt. Chief Juſtice*

OF

THE COURT OF QUEEN'S BENCH,

Anonymous. Caſe 270.

HOLT, *Chief Juſtice*. There needs no privilege to make *a fiſh pond*, as there needs in caſe of *a warren*. Fiſh pond and warren.

Anonymous. Caſe 271.

HOLT, *Chief Juſtice*. One cannot declare againſt A CORPORATION aggregate as *in cuſtodiâ mareſchalli* (*a*). Summons, attachment, and diſtreſs, is the only way of proceeding againſt a corporation.—12. Mod. 559. 672. Ld. Ray. 79. 1241. 3. Peer Wms. 426. 1. Brown's Ch. Rep. 471. 1. H. Bl. Rep. 209. Kyd on Corporations, vol. i. page 271. 5. Com. Dig. "Pleader," (2. B. 2.) Stra. 612. 614.

(*a*) Skin. 2. 154. 5. Com. Dig. "Pleader," (2. B. 2.) Tidd's Practice, 20.

Anonymous. Caſe 272.

PER CURIAM. One is indictable for ſetting up a market, or a fair, or a leet. To ſet up a fair, market, or leet, is indictable.

* It is an uſurpation upon the queen, for which ſhe may bring a *quo warranto*, where there may be two judgments; the one, for ſeizure of the franchiſe into the queen's hands; the other, for a fine for the uſurpation; and to keep a leet to ſummon the ſubject to make preſentments, and to amerce, is a grievance to the people beſides. So of fair or market, if they take toll of people. * [184] 4. Com. Dig. "Indictment" (D.) Ld. Ray. 149.

Caſe 273.

Anonymous.

In what caſe intereſt ſhall be allowed on a bond.

S. C. ante, 167.

HOLT, *Chief Juſtice*. If a bond be for four hundred pounds, with condition to pay two hundred at a day, without mention of any *intereſt* to be paid for the two hundred pounds, ſo that if the two hundred pounds be paid at the day, the bond is ſaved; though the money be not then paid, ſo that now the obligor cannot be relieved againſt the penalty without paying intereſt, yet ſuch bond needs no ſpecification by the late act of parliament.

TRINITY TERM,

The Third Year of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powis, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*

Edward Northey, *Eſq. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

Herring *againſt* Crocker. Caſe 274.

If a *fieri facias* be taken out, and the goods levied before judgment entered on the roll, and another *fieri facias* is delivered to the ſheriff upon another judgment, to which he returns *nulla bona*, and then the goods are ſold under the firſt writ, and ſatisfaction entered, but the roll not filed; the Court will not, on an action brought by the *ſecond plaintiff* againſt the ſheriff for a *falſe return*, give the *firſt plaintiff*, who had indemnified the ſheriff, leave to file his roll. S. C. Holt, 402. Poſt. 191. 1. Saund. 39. 7. Mod. 37. 118. 12. Mod. 146. 177. 1. Ld. Ray. 258. 2. Ld. Ray. 990. 4. Com. Dig. "Execution" (D. 1.). Dougl. 415. 1. Term Rep. 118.

JUDGMENT was obtained by confeſſion three Terms before, and before any entry on THE ROLL of the judgment a writ of *fieri facias* was taken out, and the ſheriff, taking ſecurity for his indemnification from the plaintiff in that judgment, levied goods to the value. And now another *fieri facias* upon another judgment being brought to him, he returned *nulla bona*. The goods were ſold upon the firſt writ, and the money paid by the ſheriff, and ſatisfaction entered upon the judgment, but THE ROLL was not filed. The plaintiff in the ſecond *fieri facias* brings an action of *falſe return* againſt the ſheriff.

IT WAS MOVED *for the plaintiff* in the firſt *fieri facias* to have leave to file his roll.

PER CURIAM. How can an action for a *falſe return* be maintained againſt the ſheriff if there be no fraud in him? and if there be, you have your remedy, notwithſtanding the filing of this roll, as well as if it be not filed. The ſheriff would not be liable to the defendant in the firſt judgment in treſpaſs, for the writ is enough to juſtify him, and he is not bound to examine any far-

HERRING *againſt* CROCKER.

ther (*a*). By the ancient rules of the Court, the judgments of one Term ought to be entered upon THE ROLL before the *eſſoin-day* of the next Term, and the ſtatute for docketing of judgments was only in imitation of the ancient courſe, and in aid of it.

HOLT, *Chief Juſtice.* The common law is, and that is indulgent enough, that all things done in *the Vacation* ſhall refer to *the precedent Term*; and though no inconvenience appear to us if this judgment be now filed as of the due Term, yet we cannot foreſee how far ſuch a retroſpect may affect others. If this firſt debt be a juſt debt, and the party, without any compulſion, had paid it before your writ came to the ſheriff, it had been good againſt you: ſo here, if the debt were juſt, and a writ had come to the ſheriff, and he had levied the money, and paid it before the
*[185] ſecond writ had come to * him, it had been good againſt the ſecond plaintiff (*b*), though the firſt had no judgment.

Therefore he adviſed DARNELL, *Serjeant*, to conſider of it again before he proceeded with the action againſt the ſheriff.

And they would not grant the motion.

(*a*) See 4. Com. Dig. "Impriſonment" (H. 8.).

(*b*) See Rocke *v.* Dayrell, 4. Term Rep. 402.

Caſe 175.

The Queen *againſt* Beſt and Others.

An indictment for conſpiring to charge a man with being the reputed father of a *baſtard child*, need not aver that the perſon charged was not the father; but the *order of filiation*, while unreverſed, is concluſive evidence of his being the *reputed father*.

S. C. ante, 137. S. C. 1. Salk. 374. S. C. Holt, 151. S. C. 2. Ld. Ray. 1167. S. C. 3. Ld. Ray. 77. Ante, 100, 165. 1. Keb. 239. 254. 2. Keb. 59. Hob. 219. 2. Mod. 10. 321. 10. Mod. 246. 256. 259. 12. Mod. 248. 255. 454. 542. 1. Ld. Ray. 81. 377. 2. Ld. Ray. 1169. 1. Stra. 499. 593. 2. Stra. 1187. 4. Com. Dig. "Indictment" (D.).

THE defendants were indicted, for that they, being idle, ſcandalous, and wicked perſons, in order to oppreſs and defame one *Peter Pickering*, and to get unto themſelves unlawful gains of money from the ſaid *Peter Pickering*, did *falsò*, *nequiter*, *malitiosè*, &c. conſpire, contrive, and agree among themſelves, *falsò* to charge the ſaid *Peter Pickering* with being the father of a baſtard child, with whom they pretended one *Elizabeth Church* to be then big, and that in purſuance thereof they did *falsò* affirm him to be the father of it.

Upon demurrer, now BROTHERICK took exception,

FIRST, That it was not averred, *ubi revera* he was not the father of it, or *ubi revera* the ſaid *Elizabeth Church* was not then with child; and that it was eſſentially neceſſary to the maintaining ſuch indictment to aver that the party was innocent (*a*). And it is ſo far from being falſe that he was the father of the child, that he is adjudged to be ſo by the juſtices of peace, and ordered to maintain it. And if this were an indictment for perjury, for falſly ſwearing that a deed was executed by ſuch a party, without

(*a*) 9. Co. 53. a.

ſaying

ſaying *ubi revera* no ſuch deed was executed, the word *falsò* would not even by intendment import that the deed was not executed, but only that the party that ſwore it was a falſe perſon generally; and if iſſue were taken that he did not falſly affirm it, the affirmation, and not the falſity, would not be triable.

DEE, *contra*. The indictment is grounded merely upon the conſpiracy to charge falſly; and this conſpiracy, with the ſubſequent falſe affirmation, is ſufficient to maintain the indictment within the expreſs reſolution of *the Poulterers' Caſe*.

HOLT, *Chief Juſtice*. Though a conſpiracy to charge falſly be indictable, yet the party ought to ſhew himſelf to be innocent, for people may lawfully meet, and contrive and agree to charge a guilty perſon; and to ſay that they met and agreed to charge falſly, perhaps will not be enough, without ſhewing the foundation of the falſity, *viz.* the party's innocence. And here, if the defendants had pleaded *not guilty*, they muſt have been acquitted; for the order of two juſtices ſtanding * in force, would have concluded *Peter Pickering* from giving evidence of his innocency. * [186]

BROTHERICK took another exception, *viz.* that it does not appear that any thing was done in purſuance of the conſpiracy, and that alſo ought to appear, according to *The Poulterers' Caſe (a)*. An illegal conſpiracy is indictable, though nothing be done in purſuance of it.

DEE, *contra*, to ſhew that a falſe conſpiracy, without further act of purſuance, is indictable, quoted 1. *Sid.* 68. 1. *Leo.* 62. S. C. Salk. 174. S. C. Holt, 191. Ante, 100.

And the caſe being ſpoke to again this Term,

MONTAGUE, *for the defendants*, urged, that it ought not only to appear that the accuſation was falſe, but that it was before a lawful magiſtrate; otherwiſe it could not be a legal accuſation. Ld. Ray. 379.

SECONDLY, And if this were *a writ of conſpiracy*, it would not have lain before an acquittal, and then there would be no need of an averment of the party's innocence, becauſe the acquittal would tantamount. And he inſiſted, that if this had been for *perjury*, there muſt be an averment that the matter ſworn was not true, and that the *falsò* would not ſerve; and for that he quoted the caſe of *The King v. Griepe*. And he took a diverſity between *a conſpiracy* and *a confederacy*; the one muſt be in *judicial proceedings*, the other may be *in pais (b)*; but this indictment is for a conſpiracy. 3. Mod. 220. 2. Inſt. 561, 562.

But on the other ſide was quoted a precedent out of *Weſt (c)*, agreeing with this: It was for conſpiring falſly to charge one with felony, without any averment that he was innocent. In the *Year-Book (d)*, a conſpiracy laid in one place to charge with a

(a) 9. Co. 59. Moor, 813.

(b) See the ſtatute 28. *Edw.* 1. c. 10.

(c) Weſt's Precedents 2. page 102. f. 97. which POWELL, *Juſtice*, ſaid, was a pretty judicious book; but HOLT, *Chief Juſtice*, ſaid that there are many bad precedents in it. See 2. Ld. Ray. 1269.

(d) 42. *Edw.* 3. pl. 15.

THE QUEEN *against* BEST AND OTHERS.

fact in another county, and *the venue* came from the county where the conſpiracy was laid.

HOLT, *Chief Juſtice.* Your caſe of *perjury* is not like this; for there the crime merely conſiſts in the fact ſworn, and the matter is indifferent until the averment of *ubi revera* comes: but here is a confederacy to charge a man *falsò, nequiter, malitiosè, &c.* and though the word *confederaverunt* be not in, yet there are the words *machinaverunt et aggregaverunt*, which are as full. This indeed is not an indictment for a formed conſpiracy, ſtrictly ſpeaking, which requires an infamous judgment, and loſs of *liberam legem*, as upon conviction on an attaint, and for which an indictment will not lie until acquittal, or an *ignoramus* found *(a)*. But this ſeems to be a conſpiracy *latè loquendo*, or a confederacy to charge one falſly, which ſure, without more, is a crime *(b)*; and it is a crime for ſeveral people to join and agree together to proſecute a man right or wrong. If in an indictment for ſuch confederacy you proceed further, and ſhew a legal proſecution of the confederacy, there you muſt ſhew the event thereof, as "*ignoramus*" returned on the indictment, or an acquittal, or elſe the indictment fails; but where you reſt upon *the confederacy*, it will be well without more.

1. Cro. Jac. 131. acc.

2. Cro. Jac. 8.

Cro. Jac. 131. contra.

Vide ante, 100. 137. 169.

And it ſeemed to THE WHOLE COURT, that the very agreeing together to charge a man with a crime falſly, is a conſummate offence, and indictable: and as to the want of averring his innocence, every * man is preſumed innocent until the contrary appears, and the *falsò* ſtrongly implies his innocence. Indeed, if the truth had been, that there was a woman with child, and the pariſh likely to become chargeable, and the defendants being pariſh-officers had met to inquire and find out the father, to ſave the pariſh harmleſs, and, upon ſuch an occaſion, ſhould, upon their information, charge this *Peter Pickering* to be the father, and the indictment had been for that, they muſt have been acquitted.

* [187]

And though ALL THE COURT were clear for THE QUEEN, yet at the importunity of BROTHERICK, they let it paſs over until the next Term.

Ante, 137, 138. 169.

2. Haw. ch. 43. ſec. 25 ch. 46. ſec. 19.

And in the Trinity Term after, JUDGMENT was given for the queen. For it is a conſpiracy to charge one falſly with fornication, which, though it be no crime at common law, is puniſhable in the ſpiritual court; and a confederacy falſly to charge with a thing that is a crime by any law is indictable, and the confederacy is the *gîst* of the indictment. PER TOTAM CURIAM.

(a) Fiſher v. Briſtow, Dougl. 215. Wicks v. Fentham, 4. Term Rep. 247.

(b) See Rex v. Spragg, 2. Burr. 993.

Anonymous.

Anonymous.

Caſe 276.

HOLT, *Chief Juſtice.* If an attorney will take a man's money to do buſineſs, and does not do it, we may enter into a ſummary examination of it, and if we find him refractory, we may ſtrike him out of THE ROLL.

The Court may proceed in a ſummary way to ſtrike an attorney off THE ROLL.

Ante, 16. 42. 86. 4. Inſt. 102. marg. Ray. 194. Pr. Reg. 7. 2. Lev. 66. Latch. 124. 1. Com. Dig. "Attorney" (B. 15.). 4. Burr. 2060. 2. Bl. Rep. 780. 2. Wilſ. 371. 382. 2. Hawk. P. C. ch. 22. ſ. 11. 1. Bac. Abr. 198. Cowp. 829. Dougl. 114.

The Queen *againſt* Wheeler.

Caſe 277.

INQUISITION before the coroner, *ſuper viſum corporis*, that the *wheel of a forge* moved to the death of the deceaſed.

The *wheel* of a forge or mill cannot be *deodand*, for, being *fixed* to the freehold, it cannot *move* to the death of a perſon.

And now it was moved to ſtay proceſs for ſeizing it as *a deodand*, becauſe it was parcel of a freehold, as the wheels of a mill or a mill-ſtone, which were agreed to be freehold, and therefore not capable of being *a deodand*.

HOLT, *Chief Juſtice.* A mill is a known thing in law, and ſo are the parts thereof; and therefore if the owner of a mill take out one of the mill-ſtones to prick or gravel it, and deviſe the mill while the ſtone is ſevered from it, yet it ſhall paſs as part of the mill: and *a bell* cannot be *a deodand*.

1. Salk. 220. 1. Lev. 136. Ray. 97. 1. Hawk. P. C. c. 26. ſ. 5. 8. Stra. 67. 6. Com. Dig. "Waiſe" (E. 2.). 2. Bac. Abr. 26.

ET PER OMNES, Let proceſs upon the inquiſition ſtay.

[* 188]

* Britton *againſt* Standiſh.

Caſe 278.

A LIBEL was brought againſt him in THE SPIRITUAL COURT, for not coming to his pariſh-church on *Sunday*, and not receiving the ſacrament at *Eaſter*.

The eccleſiaſtical court may proceed on the ſtatute 1. *Eliz.* c. 2. ſ. 14. againſt a man for not going to his pariſh-church on *Sunday*, and for not receiving the ſacrament at *Eaſter*; for that ſtatute expreſsly ſubjects theſe offences to the cognizance of the eccleſiaſtical courts. *Sed qu.* if they have not an *original*

PARKER moved for a prohibition upon a ſuggeſtion, that the determination of the bounds of pariſhes, and the interpretation of the laws and ſtatutes of the realm, belonged to the queen's temporal courts, and that by them no man is bound to go to his *pariſh-church*, ſo he go to ſome church, and that the defendant did conſtantly reſort to another church.

And day being given by the Court for the hearing Counſel of both ſides,

RAYMOND *againſt the prohibition.* The ſuggeſtion does not ſay, that he reſorted to any church in which there were divine prayers. By the old received CANONS, every pariſhioner is bound to repair to his pariſh-church on *Sundays* and *Holidays*, and it is

juriſdiction in ſuch caſes. S. C. 1 Salk. 166. S. C. 3. Salk. 81. S. C. Holt, 141. 2. Vent. 44. Hard. 406. 3. Mod. 42.

BRITTON against STANDISH.

no excuſe that he went to another church without it be upon an extraordinary occaſion, and for a reaſonable cauſe, which ought to come on his ſide, and of which the ſpiritual court are judges. By *Linwoode* (*a*) the word "*voletibus*" in the CANON implies a liberty to pariſhioners of not coming to the pariſh-church on other days than *Sundays* and *Holidays*, which are days of obligation; and herewith agrees *Selden* (*b*). By an injunction of the Church (*c*) it is directed, that ſome diſcreet perſons of the pariſh be appointed to ſee that pariſhioners do repair to their pariſh-church, and to preſent ſuch as do fail, in order to a compulſion by eccleſiaſtical cenſures. The ninetieth canon of the Conſtitutions of 1603, and the ſtatute of 1. *Eliz.* c. 2. ſ. 14. are expreſs in the point; and the Act of Toleration, 1. *Will. & Mary*, makes alteration only in favour of *proteſtant diſſenters*, and therefore cannot avail the defendant here, he having not ſhewed himſelf one, as he ought if he would take advantage of it (*d*). Then as to the reaſon of the thing itſelf, it ſeems clear for us; for pariſhes at firſt were diſtricts, certain parts of the dioceſe, and the care of the ſouls of the inhabitants were charged upon certain prieſts, who were maintained by the dioceſan by a diſtribution of the offerings made at *Chriſtmas* (*e*); and by the ancient canons, as well as by acts of parliament, ſuch prieſts having cure of ſouls, were bound to a reſidence upon their pariſhes, the better to diſcharge that great duty; which end they could not well anſwer, or miniſter fit remedies to the ſpiritual diſeaſes of their pariſhioners, if the pariſhioners might chuſe whether they
* [189] heard their inſtructions or not. * And as to the other charge in the libel, *viz.* the not receiving *the ſacrament* at *Eaſter*, *Linwood* (*f*) ſays, that all *Chriſtians* ought to receive *the ſacrament* at leaſt once a-year, *viz.* at *Eaſter* (*g*). And ſo is THE RUBRICK eſtabliſhed by parliament, and THE TWELFTH CANON of the Conſtitutions of the year 1603 (*h*).

PARKER, *contra*. As to the ſtatute 1. *Eliz.* c. 2. though the words be, "that every pariſhioner ſhall repair to his pariſh-"church," yet the true meaning of it is well expounded by other ſubſequent ſtatutes, where that clauſe of it is taken notice of, and recited according to the meaning and ſubſtance thereof, *viz.* "that every man ſhould go to his own pariſh, *or ſome other* "*church*, &c." (*i*).

HOLT, *Chief Juſtice*, ſeemed to doubt whether a pariſhioner is compellable by eccleſiaſtical cenſures, to repair to his pariſh

(*a*) Lindwood de Paroch. 186 and his Comment upon the word "volen-"tibus."
(*b*)
(*c*) See Sparrow's Collection, 78. and Injunction, 46.
(*d*) 2. Rell. Rep. 455.
(*e*)
(*f*) Lindw 8. 143.
(*g*) Lindw. 227.
(*h*)
(*i*) See 3. *Jac.* 1. c. 4. ſ. [illegible] 1. *Will. & Mary*, c. 18. Cawley's Law of Recuſants, 1. Pt. Spel. Conſil. 193. 2. Pt. Spel. Conſil. 141. 1. Lev. 5. 167. Cro. Jac. 480. 3. Mod. 43.

church

church on *Sundays*; for at that rate, the gentlemen of *Gray's-Inn*, of *Lincoln's-Inn*, *&c.* who have a chapel of their own, in which they have conſtant prayers, would be compellable to go to their reſpective pariſhes, a thing which was never thought they were obliged to: and he thought pariſhes were inſtituted for the conveniency of the pariſhioners, that they might have a place certain to repair to when they thought convenient; and a parſon, from whom they had a right to receive inſtructions, and other church-rites: yet he agreed, that it was not commendable for a pariſhioner to abſent himſelf humorouſly from his pariſh. One is indeed bound to receive *the ſacrament* three times a-year; and that *Eaſter* was only named for direction, but not for compulſion, and ſeemed to be mentioned for the ſake of the offerings then.

Ratcliff against Standish.

Powell, *Juſtice, totis viribus contra.* The truth is, we live in an age where men are apt to bring thoſe things in queſtion, of which our anceſtors never doubted; and it is not fair to inquire ſo narrowly into the original of the juriſdiction of the eccleſiaſtical court on all occaſions. It is plain they are in poſſeſſion of this juriſdiction, and frequently exerciſe it; and if we will aſk, how they come to have cognizance of teſtamentary matters, we ſhall find no other right they have to it, but conſtant and uninterrupted uſage. As to the inſtance of *Gray's-Inn*, and ſuch like, there will be uſage againſt uſage, and the repairing to ſuch a chapel will be a reaſonable excuſe, and ought to be pleaded; and for a full authority in the point, he relied on *Brown's Caſe* (*a*), where a prohibition was denied, the queſtion there being on the reaſonableneſs of the excuſe pleaded; of which the Court ſaid, the ſpiritual court was the proper judge. And the reaſon of the pariſhioners obligation to come to church, is not for the ſake of any offering or profit to the parſon, but in regard that he has the care of their ſouls, which he could not diſcharge if they came not to hear him.

* Gould, *Juſtice, accord*. That they have original juriſdiction, is moſt plain in both the inſtances in the libel; and he quoted *Lionel Copley's Caſe* (*b*), and the caſe of *Brown v. Latten* (*c*). * [190]

Holt, *Chief Juſtice.* A juriſdiction allowed to them time immemorial, muſt be taken to belong to them by law; but what I doubt at preſent is, whether this be ſo: and if there be any ancient canon for it, and received here before 1603, I will agree with you; but if not, no canon ſince, though in full convocation, can, *proprio vigore*, bind laymen (*d*).

And it was propoſed to them to ſtay below by conſent, and to *declare in prohibition* forthwith, that the matter might be judicially determined.

(*a*) 2. Roll. Rep. 455.
(*b*) Hard. 406, 407.
(*c*) Hard. 503.
(*d*) See the caſe of Middleton *v.* Crofts, B. R. H. 326. S. C. Stra. 1056. S. C. 2. Atk. 650.

At

Britton *againſt* Standish.

At another day, Montague moved for a prohibition in the like caſe.

And then Holt, *Chief Juſtice*, having viewed the authorities, and the act of 1. *Eliz.* c. 2. clearly, ſaid, that if the libel be grounded upon the ſtatute of 1. *Eliz.* c. 2. they may compel you to come to the pariſh-church, for that ſtatute directly ſubjects people to the eccleſiaſtical law in this point; and the caſes in *Hardres* (*a*) and *Rolle* (*b*) before-mentioned are direct in the point, and we muſt not ſit here to encourage irreligion, to which people are too prone now-a-days; and if one do go to a cuſtomary chapel within the pariſh, it will be good excuſe, but it muſt be pleaded.

Holt, *Chief Juſtice*. If a man be a profeſſed church-man, and his conſcience will permit him ſometimes to go to meeting inſtead of coming to church, the Act of Toleration ſhall not excuſe him, for it was not made for ſuch ſort of people.

But no rule was given, the Court ſaying, they would think of it before the end of the Term.

And at laſt, a prohibition was granted, and ordered to declare forthwith.

(*a*) Hard. 406. 503. (*b*) 1. Roll. Rep. 455.

Caſe 279.

The Queen *againſt* The Pariſh of Thurſley.

If a ſon be bound apprentice to his father, and the father give up his indenture to the ſon, and hires him out in another pariſh, where he ſerves a year, he is ſettled in the father's pariſh; for the indentures not being cancelled the apprenticeſhip continues.

Upon an order of ſeſſions concerning a poor perſon in the pariſhes of ——— and *Thurſley* in *Surrey*, the caſe was thus:

The ſon was bound an apprentice to his father; the father gave up his indenture to the ſon, and bound him out to a ſervice into another pariſh for a year, where he ſerved, but did not cancel the indenture; and becoming poor, the juſtices ordered him laſt legally ſettled in the pariſh where the father lived, becauſe the indenture being ſtill in force, his apprenticeſhip continued.

Brotherick urged, and it was agreed, that an *accord* with *ſatisfaction* would be a good diſcharge of this covenant; and by him here is that which in its nature tantamounts to *a ſatisfaction* to the father, for now he is diſcharged of the obligation of providing for the ſon as an apprentice.

Yet per Curiam, The indenture not being cancelled, the obligation of the apprentice continues; and if the father ſhould get the indenture into his hands again uncancelled, and ſue the ſon thereupon, the aforeſaid agreement would not be a good plea for the ſon; and * it is a good plea to *a covenant*, or even to *a promiſe*,

promiſe, that the plaintiff agreed the defendant ſhould be diſcharged of it (*a*).

THE QUEEN *againſt* THE PARISH OF THURSLEY.

And POWELL, *Juſtice*, remembered the caſe in the *Year-Book* of *Henry the Seventh*, where one was bound by bond, and the obligee delivered it to the obligor, who omitting to cancel it, the obligee having lit on it, put it in ſuit; and all this was pleaded ſpecially, and adjudged no plea.

But upon ANOTHER EXCEPTION, a rule was made to ſhew cauſe why the order ſhould not be quaſhed.

(*a*) Rex v. Buckingham, 2. Ld. Ray. 1352. Rex v. St. Mary Kallander, 2. Burr. S. C. 274. Rex v. Auſtrey, 2. Burr. S. C. 441. Rex v. Juſtices of Devonſhire, Cald. 32. Rex v. St. Mary Lambeth, 1. vol. Bott's P. L. 3d. edit. 470.

Hodges *againſt* Templer.

Caſe 28.

RULE was for judgment in *Hilary Term* was twelvemonth; but coſts being not taxed, MR. CLARKE, out of kindneſs to the defendant, gave time for ſettling the coſts until *Eaſter Term*, and before coſts ſettled, and judgment entered, the plaintiff died. The laſt *Hilary Term* the attorney entered up his judgment as of *Hilary Term* before, *viz.* the time that the rule was pronounced.

If judgment be given in any Term, it may be entered upon THE ROLL as of the ſame Term in which it was given at any time after. Ante, 14. 59. 184.

And now upon motion, it was ſet aſide for irregularity; and they directed them, if they pleaſed, to enter it as of *Hilary* laſt, being the Term that they really had entered it, and enter their continuance till then, for the Court could not take notice of the plaintiff's death.

1. Salk. 401. Poſt. 241. 1. Mod. 1. 8. Mod. 189. Stra. 639.

310. 10. Mod. 30. 325. 12. Mod. 250. 493. 519. Ld. Ray. 695. 850. 869.

HOLT, *Chief Juſtice*. If one will enter a judgment as of a Term, he muſt actually enter it before the *eſſoin-day* of the ſucceeding Term, otherwiſe it ſhall only relate to the Term of which he enters it: and if judgment be ſigned in *Hilary Term*, and in the ſubſequent Vacation the defendant ſell lands, and before *the eſſoins* of *Eaſter Term* the plaintiff enter his judgment, it ſhall affect the lands in the hands of the purchaſer; and if one enter judgment ſo in Vacation, when indeed the party was dead, if he was living in the precedent Term, the judgment is good by relation (*b*).

4. Com. Dig. "Execution" (D. 1.). "Pleader" (M. 4.). Cowp. 357.

(*b*) See Lord Mohun's Caſe, ante, 59. Tonker v. Duke Beaufort, 1. Burr. 147. Mayor of Norwich v. Berry, 4. Burr. 2277.

The

Caſe 281.

The Queen *againſt* The Inhabitants of the County of Wilts.

On an information againſt *a county* for not repairing a bridge, THE ATTORNEY GENERAL may try the cauſe in any adjacent county, and award the *venire* either to the *body* of that county, or to the *vicinity* of any particular place therein.

THE inhabitants of the county of *Wilts* were informed againſt, for not repairing *a common bridge* in their county.

THE ATTORNEY GENERAL now moved for a *venire facias* to the county of *Berks*, the whole county of *Wilts* being concerned.

And PER CURIAM, The attorney general may chooſe which of the adjacent counties he pleaſes, and he may have the *venire facias* from the body of that county, or *de vicineto* of ſuch a particular place therein next adjacent to *Wiltſhire*.

And the defendant is not intitled to an imparlance upon amendment of an information.

S. C. poſt. 307. S. C. 1. Salk. 359. S. C. 3. Salk. 381. S. C. Holt, 339. Ante, 150. Poſt. 255. 1. Vent 61. 1. Hawk. P. C. ch. 77. 12. Mod. 372. 442. 503. 568. Stra. 874. 911. 1. Term Rep. 363.

Caſe 110.

Anonymous.

Attornies.

PER CURIAM. An *under-ſheriff* ought not to ſerve as *an attorney* during his ſhrievalty (*a*).

(*a*) By the ſtatute 1. *Hen.* 5. c. 4. "it "is ordained, that no under-ſheriff be "attorney in the king's courts during the "time that he is in office" And by a rule of Mich. Term 1654, if he do, he ſhall be ſtruck off THE ROLL of attornies, and not re-admitted. See alſo Dalton's Sheriff, c. 115. p. 454. and the ſtatute 3. *Geo.* 1. c. 15. Impey's Sheriff, 61.

* [192]

Caſe 282.

* The Queen *againſt* Baines.

The ſeſſions, on articles exhibited purſuant to 1. *Will. & Mary*, c. 21. ſ. 6. may enquire into *exceſſive fines* taken by a *clerk of the peace*.

S. C. 2. Salk. 680. S. C. Holt, 512. 514. Carth. 426.

BAINES was convicted before the juſtices of the peace at their quarter-ſeſſions, upon certain ARTICLES of miſdemeanors in his office of *clerk of the peace* for the county of *W.* (purſuant to the authority given to the juſtices by the ſtatute 1. *Will. & Mary*, c. 21.) exhibited againſt him. And the order being removed up by *certiorari*,

MR. WELLS took ſeveral exceptions to it.

FIRST, The offences examinable by the juſtices muſt be in execution of his office only; but all the offences charged in THE ARTICLES are for the extortion of exceſſive fees, which is no part of the execution of the office, but rather are ward for it.

SED PER CURIAM, That is a nice diſtinction between taking fees and executing an office; and ſure taking of fees *colore officii* is an act in the execution of an office; and an office and profits are as much the ſame as the lands and profits of them are one thing.

SECONDLY,

SECONDLY, The words of the ſtatute are, "that the juſtices of peace may at their ſeſſions receive articles againſt him, which ſaid juſtices may, if they ſee occaſion, convict him;" and here it appears the articles were received by ſuch and ſuch, eleven in all, by their names, at ſuch a ſeſſions, and the matter adjourned to another ſeſſions; and there before ſix of the aforeſaid eleven juſtices, *and others*, he was convicted; ſo the words not purſued.

Other juſtices than thoſe who conſtitute the ſeſſions when ARTICLES are exhibited againſt a *clerk of the peace* may proceed to enquire into the truth of the charges, and remove him.

Sed non allocatur: For the meaning of the ſtatute is not, that the ſame individual perſons who received the complaint ſhould remove; but it is enough that they are virtually the ſame, *viz.* the ſame court; and though not one of thoſe who received it were at the next ſeſſions held by adjournment, it would be notwithſtanding well.

11. Mod. 80. 137. 12. Mod. 13. 2. Stra. 996.

42. 109, Ld. Ray. 159. 163. 166.

THIRDLY, It does not appear that he was a *clerk of the peace* at the time of the ſuppoſed extortion committed; but it is only ſaid, that he claimed and exerciſed the ſaid office, and that might be, and he have no right to it, or that he executed it as a deputy.

In ARTICLES exhibited againſt a *clerk of the peace* it muſt be alledged that he was *clerk of the peace* at the time.

And this ſeemed a good exception; for if he be in by wrong, or as deputy to another, and commit cauſes of forfeiture, and afterwards get in by title, or as principal, he would not by reaſon of thoſe precedent miſdemeanors loſe his office.

FOURTHLY, In the articles, which were the foundation of the proceedings, and ought to be direct and certain, one fact charged was, that he did extort and force ſuch a perſon to pay him two ſhillings and ſixpence for a *ſubpœna* for a witneſs to appear at the quarter-ſeſſions, which was more than his juſt fees, without ſhewing what the juſt fees were, or laying it to have been *colore officii*, or what quarter-ſeſſions the witneſs was *ſubpœna'd* to; for it might be the quarter-ſeſſions of *York*, *Cornwall*, &c. and therefore not a matter in the execution of his office.

In articles againſt a *clerk of the peace* for extortion, it is ſufficient to ſay, that he took more than his *juſt fees*.

* [193]

FIFTHLY, * Another ſum articled againſt him for was ſaid to be for a matter done at the quarter-ſeſſions of his county, but not ſaid to be *colore officii*.

Articles againſt a *clerk of the peace* for extortion muſt ſhew it was *colore officii*.

And by HOLT, *Chief Juſtice*, and POWELL, *Juſtice*, clearly, Theſe ARTICLES, being a charge againſt the defendant to bring him under a forfeiture of his office, in which now by the late act of parliament he has *a freehold*, ought to be as direct and certain as *an indictment:* but as to the want of aſcertaining what the juſt fees were, it is ſaid to be more than the juſt fees.

The articles againſt a *clerk of the peace* ought to be as certain as an indictment.

1. Show. 282. Stra. 996. 1. Vent. 19, 20. Carth. 226.

And by POWELL, *Juſtice*, That is enough, for the juſtices are judges of that where the fees are not aſcertained by act of parliament.

HOLT,

THE QUEEN *againſt* BAINES.

HOLT, *Chief Juſtice*, and POWELL, *Juſtice*. We cannot intend any thing where a man's freehold is to be forfeited; and it does not appear that the firſt ſum was taken for any thing under his management as *clerk of the peace*, and the conviction muſt be according to the articles, and not exceed the extent of them.

And it being ſpoke to again,

The ſaid TWO JUSTICES were clear of the ſame opinion: for this charge would be bad in an indictment for extortion in his office; and this ſummary way is ſevere enough, without having it more looſe than an indictment, which would only ſubject him to a fine, whereas this is in order to a forfeiture of his freehold: and if this were an indictment, the extortion muſt have been laid *colore officii*; and it is not enough that the title of the articles is, that it was for miſdemeanors in his office; but the inſtances ought to be alledged ſo too; and the recital in the order that it was *colore officii* is only a falſe inference of the juſtices not warranted by the articles, which are the foundation; and he cannot be convicted of anything but what he is charged with in writing; and he is charged with nothing directly in execution of his office.

GOULD and POWYS, *Juſtices*, *dubitantibus*, Whether this need be as certain as an indictment, for then without doubt it would be bad. And becauſe they were not ſatisfied, though the other two were very clear (*ut ſupra*), it went over till the next Term.

If a *clerk of the peace*, to prevent a forfeiture, ſurrender to *the cuſtos*, a new grant to him will not purge the forfeiture.

HOLT, *Chief Juſtice*. If the *clerk of the peace* had committed a miſdemeanor, and to prevent a forfeiture had ſurrendered his office to the *cuſtos rotulorum*, and taken a new grant, that ſhould not purge the forfeiture, for then it would be in the power of *him* and *the clerk* to fruſtrate the intent of the ſtatute; and after conviction of the *clerk of the peace* for a miſdemeanor in his office, the *cuſtos rotulorum* is to nominate another perſon in convenient time, and cannot name the ſame perſon again: but if an officer commit a forfeiture, and he who is to take advantage of it accept a ſurrender, and make him a new grant, the forfeiture is purged. It is extortion in an officer to take fees when none is due, or more than is due, or before they are due: and though *the order* (*a*) be quaſhed, yet he may be proſecuted again; as if an attainder of felony be reverſed, the party muſt be tried again.

[194] * And at another day, in *Michaelmas Term*, POWYS, *Juſtice*, came over to the opinion of HOLT, *Chief Juſtice*, and POWELL, *Juſtice*, that the articles were no direct charge.

But GOULD, *Juſtice*, perſiſted, that this being in caſe of a freehold, and by conſequence the charge to forfeit ought to be certain; yet it was a freehold created by act of parliament, which act ſubjects it to a forfeiture for miſdemeanors, and directs the charge and examination thereof in this ſummary way and manner, which he thought would not require ſo great ſtrictneſs as in caſe of an

(*a*) Rex v. Lloyd, 2. Stra. 996.

indictment;

indictment; and the case of *Dyer*, 114. was quoted, where A FILAZER was removed by the Court by *parol.* THE QUEEN *against* BAINES.

But PER CURIAM, Not like this, for that amoval is not peremptory, but the cause may after come in question upon *an assize*; but this amoval is made final by the statute.

So THE COURT being clear for quashing it, THE ATTORNEY-GENERAL moved to quash the *certiorari*.

Wey *against* Yally. Case 283.

DEBT FOR RENT upon a demise of lands in *Jamaica*, brought in *London*, and plea to jurisdiction of this court, that there are courts of record there, in which all actions concerning lands there are determinable; and prays judgment, if this court has jurisdiction: and demurrer.

Debt for rent may be brought by a *lessor* against a *lessee* in the courts at *Westminster*, on a demise of lands in *Jamaica*; for the action is, in this case, on the *privity of contract*, which is transitory, and not on the *privity of estate*, which is local.

BROTHERICK, *in maintenance of the plea*, quoted the case of *Parker v. Damer* in this court (*a*), that debt does not lie here for rent against the assignee of a term in *Ireland*. And in the principal case, if the defendant had a good local plea, as an entry and ouster made by the lessor, such a plea would want trial here; and quoted for this 3. *Keb.* 150. where debt was brought for rent upon demise of lands in *Ireland*, and it was pleaded that the *Duke of York* was seised in fee of the lands, and entered, and ousted the lessee, and issue there upon the entry and ouster; and by HALE, it is bad, because the issue could not be tried here. And he said, in the principal case his client was at that disadvantage; for the house demised was casually burnt, and by an act of the State of that country ordered never to be rebuilt, and a reparation made to the lessor; and we cannot have benefit of this matter in evidence here, because the jury cannot enquire of it; and the plaintiff is at no mischief, for if he has not justice there, he may have a writ of error hither.

S. C. 2. Salk. 651.
S. C. 3. Salk. 381.
S. C. Holt, 705.
Post. 228.
Cro. Car. 183.
W. Jones, 63.
Latch, 197.
2. Lev. 80.
1. Lev. 143.
1. Saund. 238.
Hob. 37.
1. Cro. 143. 183. acc.
7. Co. 2.
1. Jo. 43, 44.
1. Vent. 59.
Tidd's Practice, 11.
2. Stra. 776.
2. Com. Dig. "Covenant" (B. 3.). (C. 3.).
3. Term Rep. 393. 584.
4. Term Rep. 504.
1. Bac. Abr. 34, 35.
1. Wilf. 165.
3. Wilf. 25.
4. Mod. 71.
3. Burr. 1271.
Dougl. 187.
Cowp. 176.
2. Term Rep. 238.

HOLT, *Chief Justice*. Your case of *Parker v. Damer* is good law; for being brought against the assignee, it is grounded upon the *privity of estate*, which is local, and therefore to be brought where the land lies; but if it had been by the lessor against the lessee, or by the assignee of the reversion, debt or covenant upon the statute 32. *Hen.* 8. c. 34. it were otherwise, for then it might be upon

(*a*) Hilary Term, 1. & 2. *Will. & Mary*, Roll 505. reported 3. Mod. 336.
1. Show. 187.
1. Salk. 80. and Carth. 182.

WEY *againſt* YALLY.

the *privity of contract*, * which is tranſitory, and therefore might be laid anywhere: If a deed bear date at a place certain, the action thereupon muſt be laid there. And it has been held, that if a local iſſue ariſe in *Ireland*, in an action laid here in *England*, it ſhall be either tried in the county where the action is laid, according to *Dowdale's Caſe* (*a*), or by ſuggeſting that ſuch a place in ſuch a county is next to *Ireland*, and have jury from thence. And here the defendant, upon *nil debet*, may give entry, &c. or the law of the country in evidence, if there be ſuch a law; and this we ſee every day done before committees of appeals from thence.

POWELL, *Juſtice*. The diverſity appears plain between *local* and *tranſitory* actions. If a deed bear date out of the kingdom, if the place of the date be not alledged ſomewhere in *England* we cannot try it; but here the action is grounded upon the contract, which follows the perſon where-ever he goes. And if the defendant had pleaded a local plea, it might be tried where the action is brought, or by ſuggeſtion, as MY LORD ſays, in the next place, whereof we have precedents in caſes from *Ireland*. And there may be a law in *Jamaica* againſt bonds, yet ſure that will not confine the action of debt upon bonds made there to that country. And an action of falſe impriſonment has been brought here againſt a *governor of Jamaica* for an impriſonment there, and the laws of the country given in evidence.

Hob. 233. Cro. Jac. 76. 1. Inſt. 261. b.

See Fabrigas v. Moſtyn, Cowp. 161.

And by THE WHOLE COURT, a *reſpondeas ouſter* was awarded.

(*a*) 6. Co. 46.

Caſe 284. Winter *againſt* Garlick.

Declaration upon arbitration-bond.

S. C. 2. Salk. 797.

CITY OF BRISTOL, *to wit.* BE IT REMEMBERED, that heretofore, to wit, in the Term of *Eaſter* laſt paſt, before our lady the queen at *Weſtminſter*, came *Edmund Winter*, by *Richard Longford* his attorney, and brought into the court of the ſaid lady the queen then there his certain bill againſt *Edward Garlick*, otherwiſe called *Edward Garlick*, of the *City of Briſtol*, apothecary, in the cuſtody of the marſhal, &c. of a plea of debt; and there are pledges of proſecuting, namely, *John Doe* and *Richard Roe*, which ſaid bill followeth in theſe words, that is to ſay, *City of Briſtol*, to wit, *Edmund Winter* complains of *Edward Garlick*, otherwiſe called *Edward Garlick*, of the *City of Briſtol*, apothecary, in the cuſtody of the marſhal of the *Marſhalſea* of the lady the queen, before the queen herſelf, being of a plea, that he render to him one hundred pounds of lawful money of *England*, which he oweth to him and unjuſtly detains, for that, to wit, that whereas the ſaid *Edward*, on the nineteenth day of *Auguſt*, in the thirteenth year of the reign of our lord *William the Third*, late *King of England*, &c. at the city of *Briſtol*, in the county of the ſame city, by his writing obligatory, ſealed with the ſeal of him the ſaid *Edward*, and ſhewn to the court of the lady the queen now

how here, the date of which is on the ſame day and year, acknowledged himſelf to be held and firmly bound to the ſaid *Edmund* in the aforeſaid one hundred pounds, to be paid to the ſame *Edmund* when he ſhould be thereunto afterwards required: nevertheleſs the ſaid *Edward*, although often requeſted, &c. hath not yet paid the ſaid one hundred pounds to the ſame *Edmund*, but hath hitherto altogether refuſed, and ſtill doth refuſe, to pay the ſame to him, to the damage of him the ſaid *Edmund* of ten pounds: and therefore he brings ſuit, &c. WINTER *againſt* GARLICK.

And now at this day, to wit, *Monday* next after eight days from the day of *St. Hilary*, in this ſame Term, until which day the ſaid *Edward* had leave to imparl to the ſaid bill, and then to anſwer, &c. before the lady the queen at *Weſtminſter*, comes as well the ſaid *Edmund* by his ſaid attorney as the ſaid *Edward* by *John Tilladam* his attorney; and the ſaid *Edward* defends the force and injury when, &c. and prays oyer of the writing obligatory aforeſaid; and it is read to him, &c. and he prays alſo oyer of the condition of the ſame writing; and it is read to him in theſe words, to wit, The condition of this obligation is ſuch, that if the above-bounden *Edward Garlick*, his heirs, executors, and adminiſtrators, for his and their parts and behalf, do and ſhall in all things well and truly ſtand to, obey, abide, perform, fulfil, and keep, the award, order, arbitrament, final end and determination of *John Hind*, of the city of *Briſtol* beforeſaid, gentleman, and *John Packer*, of the ſame city, bell-founder, arbitrators, indifferently named, elected, and choſen, as well on the part and behalf of the above-bounden *Edward Garlick* as of the above-named *Edward Winter*, to arbitrate, award, order, judge, and determine, of and concerning all and all manner of action and actions, cauſe and cauſes of action, ſuits, bills, bonds, ſpecialties, judgments, executions, extents, quarrels, controverſies, treſpaſſes, damages, and demands, whatſoever, at any time or times heretofore had, made, moved, brought, conſented, proſecuted, done, ſuffered, committed, or depending, by and between the ſaid parties, or either of them, ſo as the ſaid award be made in writing, and ready to be delivered to either of the ſaid parties requiring the ſame, on or before the eighth hour in the afternoon of this preſent day; but if the ſaid arbitrators do not make ſuch their award of and concerning the premiſes by the time aforeſaid, that then if the ſaid *Edward Garlick*, his executors and adminiſtrators, for his and their parts and behalfs, do in all things well and truly ſtand to, obey, abide, perform, fulfil, and keep the award, order, arbitrament, umpirage, final end and determination, of *Robert Godfrey*, gentleman, of and concerning the premiſes, ſo as the ſaid umpire do make his award or umpirage of and concerning the premiſes in writing, and ready to be delivered to either of the ſaid parties requiring the ſame, on or before the eighth hour in the afternoon of the day next enſuing the date of theſe preſents, then this obligation to be void, or elſe to remain in full force, ſtrength, and virtue; which being read and Plea.

WINTER *againſt* GARLICK.

heard, the ſame *Edward* ſaith, that the ſaid *Edmund* ought not to have or maintain his action aforeſaid thereupon againſt him; becauſe he ſaith, that the aforeſaid *John Hind* and *John Packer*, the arbitrators in the condition aforeſaid named, made no award, order, arbitration, concluſion, final end or determination of and in the premiſes in the ſaid condition above-mentioned, at or before the eighth hour in the afternoon of the ſaid nineteenth day of *Auguſt*, in the thirteenth year aboveſaid, being the day of the date of the writing obligatory aforeſaid: but the ſame *Edward* further ſaith, that the aforeſaid *Robert Godfrey*, the umpire in the ſame condition likewiſe named, having taken upon himſelf the burthen of arbitrating of and concerning the premiſes in the ſaid condition above ſpecified, afterwards and before the eighth hour in the afternoon of the day next following the date of the writing obligatory aforeſaid, in the ſame condition ſpecified, to wit, at the eighth hour in the forenoon of the ſame day, at the city of *Briſtol* aforeſaid, in the county of the ſame city, made his umpirage in writing of and concerning the premiſes aforeſaid, then and there ready to be delivered to the parties aforeſaid in manner and form following; that is to ſay, that all ſuits at law then depending between the aforeſaid parties ſhould ceaſe, and be no further proſecuted: and that the ſaid *Edward Garlick* ſhould pay to the ſaid *Edmund Winter*, at the then dwelling-houſe of *Samuel Fitſall*, ſituate in *Caſtle-Street*, in *Briſtol* aforeſaid, the ſum of ten ſhillings, and the coſts of law which the ſaid *Edmund Winter* had been at in that ſuit; and that after the payment of the ſaid ſum of ten ſhillings in manner aforeſaid, they the ſaid *Edmund Winter* and *Edward Garlick* ſhould give to each other general releaſes of all actions, ſuits, controverſies, and demands, from the beginning of the world to the nineteenth day of the then inſtant *Auguſt*, in common form: and the ſame *Edward* further ſaith, that after making the umpirage aforeſaid, and before the day of exhibiting the ſaid bill of the ſaid *Edmund*, to wit, on the twenty-firſt day of *Auguſt*, in the thirteenth year aboveſaid, at the ſaid dwelling-houſe of the ſaid *Samuel Fitſall*, ſituate in *Caſtle-Street*, in *Briſtol* aforeſaid, he the ſame *Edward* was ready, and offered to pay to the ſame *Edmund* then and there being preſent the ſaid ten ſhillings, and to ſeal, and as his deed to deliver to the ſame *Edmund* a written general releaſe of all actions, ſuits, controverſies, and demands, from the beginning of the world unto the ſaid nineteenth day of *Auguſt*, in the umpirage aforeſaid mentioned, in common form; but the ſaid *Edmund* then and there altogether refuſed to receive or accept the ſaid ten ſhillings and the ſaid written releaſe from the ſaid *Edward*: and this he is ready to verify: wherefore he prays judgment if the ſaid *Edmund* ought to have or maintain his ſaid action thereupon againſt him, &c.

Pleads no award made by the arbitrators, but that the umpire did.

The umpirage ſet forth, that the defendant ſhould pay coſts of ſuit.

Tender and refuſal.

Replies and ſets forth the cauſe of action, and levying a plaint.

And the ſaid *Edmund* ſaith, that he, notwithſtanding any matters by the aforeſaid *Edward* above in his plea alledged, ought not to be precluded from having his ſaid action thereupon againſt him,

him, becauſe he ſaith that the ſaid *Edward*, before the ſaid time of making the writing obligatory aforeſaid, at the city of *Briſtol* aforeſaid, in the county of the ſame city, and within the juriſdiction of the court of our ſaid late lord the king, held at his ſaid city of *Briſtol*, before the mayor and aldermen of the ſame city, falſely and maliciouſly had ſaid and publiſhed concerning the ſame *Edmund* diverſe, falſe, feigned, ſcandalous, and malicious words; and the ſame *Edmund*, for the obtaining and recovering damages by occaſion of the ſpeaking and publiſhing of thoſe words, before the ſaid time of making the writing obligatory aforeſaid, levied in the ſaid court of the ſaid late lord the king, held at the city of *Briſtol* aforeſaid, before the mayor and aldermen of the city aforeſaid, a certain plaint againſt the ſaid *Edward* of a plea of treſpaſs upon the caſe; and thereupon ſuch proceedings were had, that he the ſame *Edmund*, at the city of *Briſtol* aforeſaid, in the county of the ſame city, paid, expended, and laid out, in the proſecution of the aforeſaid plaint againſt the ſaid *Edmund*, the ſum of four pounds five ſhillings and tenpence of lawful money of *England*; and thereupon the ſame *Edmund* and *Edward*, for the determination of that ſuit, and all other demands whatſoever, afterwards, to wit, on the ſaid nineteenth day of *Auguſt*, in the thirteenth year of the reign of the ſaid late lord the king aboveſaid, at the city of *Briſtol*, in the county of the ſame city, by their ſeveral writings obligatory, by each to the other of them mutually ſealed and delivered, ſubmitted themſelves to perform and fulfil the award of the aforeſaid *John Hinde* and *John Packer*, or for want thereof the umpirage of the aforeſaid *Robert Godfrey*, that is to ſay, the ſaid *Edward* by his writing obligatory in the ſaid declaration abovementioned; and the ſame *Edmund* in fact ſaith, that he the ſaid *Edmund* after the making of the umpirage aforeſaid by the ſaid *Robert*, and before the day of exhibiting the ſaid bill of the aforeſaid *Edmund*, to wit, on the ſaid twenty-firſt day of *Auguſt*, in the thirteenth year of the reign of the ſaid late king aboveſaid, at the city of *Briſtol* aforeſaid, in the county of the ſame city, did give notice to the ſaid *Edward*, that he the aforeſaid *Edmund* in proſecution of the ſaid ſuit had paid and expended the aforeſaid ſum of four pounds five ſhillings and tenpence, and then and there demanded that money of the ſaid *Edward*; and that the ſaid *Edward* at any time hitherto hath not paid the ſaid four pounds five ſhillings and tenpence to the ſame *Edmund*, according to the form and effect of the umpirage aforeſaid: and this he is ready to verify: wherefore he prays judgment, and his debt aforeſaid, together with his damages by occaſion of the detention of that debt, to him to be adjudged, &c.

WINTER *againſt* GARLICK.

Averment of his expence in the ſuit.

And their ſubmiſſion to the award by the ſaid bond.

Notice of his expences and requeſt, and defendant's refuſing to pay.

Demurrer and joinder,

Caſe 285.

Winter *againſt* Garlick.

An award that the party ſhall pay the coſts of a ſuit *depending* in an inferior court, is void for uncertainty. —*Sed qu.*

S.C. 1. Salk. 75. 2. Keb. 231. 3. Vent. 242. B. R. H. 181. 2. Atk. (504). 519. Kyd on Awards, 88, 89. Stra. 1025. 1. Com. Dig. "Arbitrament" (A. 11.). 1. H. Bl. Rep. 223. 2. Bl. Rep. 953.

DEBT UPON BOND for performance of an award. The award was, that the defendant ſhould pay the plaintiff ten pounds, and *the coſts* of a certain ſuit before depending in an inferior court, and thereupon mutual releaſes.

Exception was taken, that the award was not *certain* nor *final*, nobody knowing what *the coſts* were: and then it was not *mutual*, the releaſes being ordered upon payment of the ten pounds and the coſts (*a*).

It was anſwered by ſtating the caſe of *Beale v. Beale* (*b*), where it is ſaid, that *the coſts* may be aſcertained by the attorney's bill.

HOLT, *Chief Juſtice*. It has been held a good award to pay ſuch coſts as THE PROTHONOTARY ſhould tax, and that carries it far enough; but ſurely they ſhall either aſcertain it themſelves, or refer it to a proper officer.

POWELL, *Juſtice*. That caſe referring to the officer of a court has been ſettled on debate; for *id certum eſt quod certum reddi poteſt* (*c*).

Et adjournatur.

(*a*) See Finney *v.* Bullock, 3. Lev. 3. Lev. 413.

(*b*) Cro. Car. 383.

(*c*) An award that one ſhall pay to the other all ſuch monies as he has expended about the proſecution of a ſuit, is good, Hanſon *v.* Liverſedge, 2. Vent. 242. ſo "that the defendant ſhall pay as the "plaintiff and his attorney by bill or oath "ſhall make appear," Linfield *v.* Fern, 3. Lev. 18. See alſo Rous *v.* Lun, 1. Keb. 569.; Meſſenger *v.* Freeman, 3. Keb. 508; Blackwell *v.* Knipe, 3. Keb. 293. And if coſts are awarded generally, but no perſon appointed to tax them, the Court may order THE MASTER to do it, Dudley *v.* Nettlefield, Stra. 737. 2. Wilſ. 268. although part or the whole of ſuch coſts be for buſineſs done in an *inferior court*, *Ex parte* Williams, 4. Term Rep. 496. But if the award order the coſts to be taxed by a perſon who is not a proper officer for that purpoſe, it is void, Knott *v.* Long, 2. Stra. 1025. B. R. H. 181. But ſee Barnes, 43. B. R. H. 161. Hullock on Coſts, 414. Arbitrators, however, are not bound to refer the taxation of coſts to the officer of the court; but they may award a groſs ſum for coſts, Shepherd *v.* Brand, B. R. H. 53.

Caſe 286.

Anonymous.

No demurrer in abatement. Poſt. 198. 1. Salk. 93. 218. 220. 1. Show. 91.

HOLT, *Chief Juſtice*. There can be no ſuch thing as a demurrer in abatement.

Harvey

* Harvey *againſt* Broad.

Caſe 287.

If a *writ of enquiry* be made returnable *tres Trinitatis*, and the return day happen to be *Sunday*, it is bad, and cannot be executed on the *Monday*; and the Court will take notice of it, although not aſſigned for error on *the record*.

IT was now the queſtion, Whether the Court ought to take notice of the miſtake of the day, by being told of it *ore tenus*, and not aſſigned for error on *the record*?

PENGELLY urged, that there was no reaſon they ſhould; for the Court in their judicial proceedings never reckon by the days of the month, but by the days of the week, as *die Lunæ prox. poſt.* ſuch a return, and relied on the caſe of *Morris v. Fletcher* (*a*), where a writ of inquiry was returnable *die Lunæ prox. poſt. quinden. Hilarii primo Caroli*, and the ſheriff returned an inquiſition before him the twenty-ſeventh of *January*, a day in truth after the writ was returnable, and yet the Court refuſed to take notice of it, being not aſſigned on the record (*b*).

BROTHERICK *contra* quoted *Cro. Jac.* 506. 548.

HOLT, *Chief Juſtice*. You cannot ſay that the *Monday* is *tres Trinitatis*, for in truth it is the *Sunday*; but becauſe *the eſſoins* cannot be kept on the *Sunday*, they are kept on the *Monday*, and yet the *Sunday* is one of the four days. At the *Council of Nice* they made a calculation moveable for *Eaſter* for ever, and that is received here in *England*, and become part of the law; and ſo is THE CALENDAR eſtabliſhed by act of parliament (*c*). And can we take notice of a Feaſt, without telling what day of the month it is? or, Shall we take notice of it becauſe you ſhew it on the record, and not when we ſee it as plainly without your telling (*d*)? In *the Entries*, the *teſte* of the writ of covenant was after its return, and this did not otherwiſe appear to the Court, but by their own taking notice of it; and, contrary to *Coke's* report of it, it was not amended, but the judgment was reverſed.

Et adjournatur.

And it being again moved in *Michaelmas Term*, THEY WERE ALL CLEAR that they muſt judicially take notice that *tres Trin.* was on a *Sunday*, and that *Gage's Caſe* (*e*) is full in the point, contrary to the report of it in 5. *Co.* 45. and ſo is the caſe of *Fiſh v. Brocket*, in *Plowden* (*f*), where a fine was reverſed becauſe one of the proclamations was on *a Sunday* (*g*).

S. C. ante, 148. 159.
S. C. a. Salk. 626.
S. C. Holt, 761.
Ante, 41. 81. 160.
Poſt. 250.
2. Keb. 58.
Jones, 156.
1. Leon. 142. 328.
1. Jones, 301.
Cro. Eliz. 227.
Cro. Jac. 16.
12. Mod. 647.
Fort. 373.
Ld. Ray. 281. 870. 1557. 1066.
1. Bl. Rep. 526.
6. Com. Dig. "Retorn" (C. 1.).
Sellon's Pract. 13.

(*a*) Cro. Car. 53.

(*b*) See the caſe of Courtney *v.* Phillips, where it was aſſigned for error on the record, 1 Lev. 196. and 3. C. 1. Sid. 291. and the caſe of Morris *v.* Fletcher, Cro. Car. 53. is allowed to be law.—See alſo Plowd. 265. a. 266. b. 1. Roll. Abr. 524. pl. 5. Dyer, 181. pl. 52. 21 *Hen.* 6. fo. 13. pl. 4 Cro. El. 227. Latch, 118. Sir Thomas Jones, 128.—NOTE *to former edition.*

(*c*) See the ſtatute *de Anno Biſſextili*, the 24. *Geo.* 2. c. 23.; 6. Com. Dig. "Temps" (B. 2.); and Davy *v.* Salter, poſt. 250.

(*d*) See Gage's Caſe, 5. Co. 45.

(*e*) Coke's Entries, 250. Moor, 571

(*f*) Plowd. 265. Dyer, 181.

(*g*) See the caſe of Swan *v.* Broome, 1. Bl. Rep. 496. and 526. S. C. 3. Burr. 1595.

Caſe 288.

* Fanſhaw *againſt* Morriſon.

Scire facias upon a recognizance, ſtating, that they and either of them *acknowledged* to owe the ſum of 40l. to be raiſed of the goods, &c. of them, and either of them, is good. 10. Mod. 306.

SCIRE FACIAS upon a recognizance by bail, ſetting forth, that they and either of them *recognovit* to owe the ſum of forty pounds to be raiſed of the goods and chattels, lands and tenements, of them and either of them, upon condition, &c.

The *ſcire facias* was to ſhew cauſe why the ſaid ſum of forty pounds ſhould not be raiſed of the lands, &c. of them and of either of them, with an averment, *quas quidem ſeparales ſummas* of forty pounds, they or either of them did not pay.

WELLS inſiſted, that the *ſcire facias* was bad; for to levy forty pounds of the goods and lands of them and either of them was to levy two ſeveral ſums of forty pounds, and that ought not to be; and relied on the caſe of *Parry v. Villars (a)*, where judgment was to recover *ſeparales ſummas*, the recognizance being as here, and judgment reverſed. And he ſaid, that it was impoſſible for two to be jointly and ſeverally indebted in one individual ſum, though they may be jointly indebted, and bind themſelves jointly and ſeverally to the payment; and therefore the common form of bonds by two are, "NOVERINT UNIVERSI, &c. *nos tenebi*," ſo making a *joint lien* for the debt, which, as to the obligation of payment, is diſtributed and made ſeveral by the "*ad quam quidem ſolut. obligamus nos et utrumque noſtrum, &c.*"

HOLT, *Chief Juſtice*, remembered, and agreed the caſe of *Parry v. Villars*, but ſaid, that by the words here one ſum was only payable, but leviable upon the goods and lands of them both, or of either of them, at the party's election. And he ſaid, there was this difference between *a bond* jointly and ſeverally, and *a recognizance* ſo; that upon the bond you cannot ſue both jointly and ſeverally, but upon a recognizance you may.

Et adjournatur.

See the reſolution in *Hilary Term*, in the third year of *Queen Anne (b)*.

(*a*) 12. Mod. 303. 1. Salk. 208. 2. Salk. 520. 2. Ld. Ray. 1138. that any judgment was given upon *the point* ſtated in the above report.

(*b*) It does not appear in any of the reports of this caſe, ante, 157.

* [198]

Caſe 289.

* Elmore *againſt* Tucker.

If *a leſſor* be bound to repair fences, he cannot diſtrain the cattle of *a ſtranger* that have ſtrayed into the land by reaſon of his neglect to repair them.—Hob. 265. 2. Saund. 282. 289. Carth. 122. 179. 186. 3. Com. Dig. "Diſtreſs" (B.).

IN REPLEVIN, conuzance was made as bailiff to *J. S.* for rent upon a demiſe by the ſaid *J. S.* of the *locus in quo*. It was pleaded in bar, that *J. S.* whoſe fee it was, time out of mind uſed, and ought, to repair and maintain the fences between the place WHERE and the plaintiff's land next adjoining, and through want of repair the plaintiff's cattle eſcaped into the place WHERE, and were diſtrained for the rent; and on demurrer,

EYRE,

EYRE, *for the demurrer*, relied on the case of *Pool v. Longville (a)*, the very case.

ELMORE *against* TUCKER.

HOLT, *Chief Justice*. I think it is hard to maintain that judgment, that when the plaintiff's inheritance is charged with the repairs, he should take advantage of his own wrong in not repairing, by making the escaping cattle a distress for his rent; and it is not like the case of lord and tenant there quoted, for the lord has nothing to do with the land, but the charge of repairs belongs to the tenant *(b)*.

PER CURIAM. That judgment is fit to be re-considered.

Ideo adjournatur.

(a) 2. Saund. 287. 289.

(b) An action on the case for not repairing fences, whereby another party is damnified, can only be maintained against the *occupier*, and not against the owner of the fee, who is not in possession, Cheetham v. Hampson, 4. Term Rep. 318.

Docmanny *against* Davenant. Case 290.

THE DEFENDANT demurred *in abatement*, and the plaintiff joined *in bar*; and *judgment final* was given for the plaintiff.

There cannot be a *demurrer* to a plea in *abatement*.

THE COURT said, they knew not what A DEMURRER *in abatement* was; for if the cause be apparent to the Court, they will abate the writ, &c. themselves, or else it ought to be pleaded. And they said, that they would turn all such *demurrers* into *bars*.

S. C. 1. Salk. 220. Ante, 195. Skin. 620. Carth. 88. 1. Show. 70. 91. 5. Mod. 133. 10. Mod. 170. 1. Ld. Ray. 20. 393. 2. Ld. Ray. 1021. 1056. 1483.

Though EYRE, *Justice*, quoted the case of *Wimbish v. Willoughby (a)*, a precedent *(b)* of a demurrer in abatement.

(a) Plowden, 73. 2. Roll. Abr. 668. (b)

Lepiot *against* Browne. Case 291.

BROWNE being removed by *habeas corpus* into the custody of THE MARSHALL, the plaintiff declared against him by the name of *J. Browne*, of such a place, *in custodiâ mareschalli*; and he pleaded in *abatement*, that his father lived in the same town, and that his name was *J. Browne* too, and concluded in *abatement*, for the want of the addition of *junior*, or some other, to distinguish him from the father.

If there be father and son of the same Christian names, a declaration against *the son in custodiâ mareschalli* is good, without distinguishing him by the addition of *junior*.

And though this was *by bill*, and so not within the *statute of Additions*, yet by the common law there ought to be *an addition* to distinguish in this case of the son; otherwise if the father were

S. C. 1. Salk. 7. S. C. Holt, 41. 2. Inst. 670. Hob. 330. Stiles, 394. 2. Roll. Rep. 225. Comy. Rep. 260. 1. Viner, "Addition" (N). 1. Com. Dig. "Abatement" (F. 21.). Ld. Ray. 304.

sued,

LEPIOT *againſt* BROWNE.

ſued, for then *J. Browne* without * addition will be taken for the father; and the being in the cuſtody of THE MARSHALL ſhall not help it:—FIRST, Becauſe there is no deſcription of the perſon. SECONDLY, Becauſe the father may be there too. And he quoted the authorities cited in the margin (*a*).

HOLT, *Chief Juſtice.* Suppoſe *father* and *ſon* be called *John Stiles*, and one by will deviſes his lands to *John Stiles*, this *primâ facie* ſhall be underſtood *the father*; but if it be made out, that the deviſor did not know the father, &c. the ſon ſhall take; *quod fuit conceſſ.* And ſuppoſe one deals with *the ſon*, and knows nothing of *the father*; ſhall he, at his peril, take notice that he has a father of the ſame name, &c.? Indeed, the defendant, by bringing the *habeas corpus*, had concluded himſelf, if you had relied upon it. If this were *an original*, and the father and ſon had lived in different counties, there had been no occaſion for the addition of *junior*.

Vide 11. Co. 89. 3. Keb. 182.

And PER CURIAM, You ſhould have alſo ſaid, that the father was *in cuſtodiâ mareſchalli* too.

And therefore *reſpond. ult. niſi* before end of Term.

But the laſt day PENGELLY ſpeaking to it again, let it go over.

(*a*) Year Books 33. *Hen.* 6. pl. 55.; the 21. *Hen.* 6. pl. 26. b.; the 5. *Edw.* 4. the 37. *Hen.* 6. pl. 29. b. pl 30. a.; the pl. 25. a.; and Raſtal's Entries, 310. 4. *Edw.* 3. pl. 31.; the 8. *Edw.* 3. pl. 50.;

Caſe 292. Adams *againſt* The Terre-tenants of Savage.

On a *ſcire facias* againſt *terre-tenants*, without naming them, if it be pleaded in abatement that *A.* is a *terre-tenant*, and not ſummoned, the defendant ſhall not *anſwer over* until *A.* be ſummoned, but the writ ſhall not be abated.

S. C. ante, 134. S. C. poſt. 226. S. C. 1. Salk. 40. S. C. 2. Salk. 601. 679. S. C. 3. Salk. 321. S. C. Lilly Ent. 398. 1. Keb. 351.

SCIRE FACIAS was brought to ſummon in the terre-tenants of *Savage*, not naming them.

To this it was pleaded in *abatement*, that *J. S.* was *a terre-tenant* not ſummoned, and concluded, *quod breve caſſetur*;

Whereas the true way had been to conclude, *ſi reſpondere debeat quouſque*, and thereupon to take a new writ to ſummon in that *terre-tenant*.

ALL THE COURT took a difference where the writ is general, and where it goes about to name the *terre-tenants* particularly, and omits one: in the latter caſe, the writ may be abated, for there the party may have a better writ of the kind, *viz.* one naming them all; but in the firſt caſe he cannot.

And therefore WE cannot give judgment to *quaſh* the writ, but only that he ſhall not be put to anſwer until the other be ſummoned.

But becauſe DARNELL, *Serjeant*, urged, that he had a multitude of precedents to the contrary, they gave day to ſhew them (*a*).

Adjournatur.

Carth. 111. Skin. 273. 12. Mod. 407. 499. Comp. 728.

(*a*) For precedents of ſuch concluſions as here, ſee Co. Ent. 604. Cliff. Ent. 702. Cro. Jac. 506. Cro. Eliz. 740. Moor, 524. 1. Keb. 55. 320. 351. Carth. 363. Bohun's Juſt. Leg. 512. 523.—NOTE *to former edition.*

Harwood

Harwood *againſt* Turberville. Caſe 293.

THE DEFENDANT borrowed money for the uſe of his mother, and obliged himſelf by bond to the payment of it, on all demands, if his mother would not pay,

If a ſon borrow money for the uſe of his mother, and give a bond to pay it *on demand*, and his mother do not pay it, THE OBLIGEE may declare on this bond againſt THE OBLIGOR, without ſtating any *ſpecial requeſt* to the mother to pay the money. Poſt. 260. 227. 2. Salk. 457. Carth. 268. 1. Lev. 3. 45. 77. 10. Mod. 519.

And now in debt upon this bond, and *oyer* thereof, he demurred to the declaration, becauſe there was no *ſpecial requeſt* with time and place of the mother; and *licèt ſæpiùs requiſitus* would not do; for, as it was ſaid, the defendant owed nothing until want of payment by the mother, and no fault could be in her, there being no demand.

PER CURIAM. When there is a duty which the law makes payable on demand, there needs no demand expreſsly laid; but where there is no duty until demand, it is otherwiſe; and here was a duty *ab initio*. If a man be bound to pay money on default of payment by another, but is not the original debtor, there he is not chargeable until *ſpecial requeſt* made of him who was to pay it.

JUDGMENT was given for the plaintiff.

Raym. 27. 1. Sid. 105. 456. 1. Mod. 35. 2. Mod. 285. 2. Saund. 66. 78. 12. Mod. 413. Ld. Ray. 596. 1095. 1140.

Walmſley *againſt* Ruſſel. Caſe 294.

THE PLAINTIFF IN THE CASE declared, that he is a man of reputation, free from all perjury and ſubornation of perjury; and that he is, and for ſix months before the words ſpoken was, a *juſtice of peace*, and is, and for ſeveral years before was, chancellor of the conſiſtory court of the *Biſhop of Coventry and Litchfield*; and writs did iſſue ſuch a year for calling a parliament, and that ſuch a day in that year was appointed for the election of burgeſſes for *Litchfield* to ſerve in the ſaid parliament; that the plaintiff intended to ſtand as candidate, and of ſuch his intention gave public notice; that the defendant knowing the premiſes, to diſparage the plaintiff in his credit and reputation, and to bring him under the penalty of perjury, and ſubornation of perjury, at ſuch a time and place, in hearing of ſeveral of the queen's ſubjects, and in the preſence of the plaintiff, ſpoke of him, the plaintiff, theſe falſe and ſcandalous words: "*There goes your rare chancellor*," *innuendo* the plaintiff, "*to ſuborn witneſſes to ſwear againſt the parſon*;" whereas the plaintiff was not guilty thereof. Verdict and damages for the plaintiff.

Quære, Whether to ſay of the chancellor of a dioceſe, "There goes your rare chancellor, to ſuborn witneſſes to ſwear againſt the parſon," is actionable. S. C. 2. Salk. 696. 3. Co. 191. 1. Lev. 280. 535. 3. Lev. 50. 7. Mod. 107. Carth. 330. Skin, 98. 112. Ld. Ray. 236. 710. 812. 1369. 12. Mod. 98. 514. 8. Mod. 270. 10. Mod. 196. 11. Mod. 193. 220. Comy. 262. Stra. 420. 617. 1157. 1168. 1. Com. Dig. 253.

GOULD, *Juſtice*. The action well lies. If the words were ſimply and abſtractedly ſpoken, without reference to any public employment or office of the plaintiff, the caſe would have been more doubtful, though I will not give any opinion even in that caſe; but here they are ſpoken in reference to his *office of chancellor*, and of one that was then in *commiſſion of the peace*, and ſtood

WALMSLEY *againſt* RUSSEL.

ſtood candidate for *a * member of parliament*; and in that reſpect they are as reproachful as can be: they wound his reputation, and craftily obſtruct his election. It has been objected, that they are not ſpoke with reference to his office. But I anſwer, they are; for they are ſpoken of one in an office of truſt, and having adminiſtration of juſtice, and ſpoken expreſsly in that capacity, "*There goes your rare chancellor.*" And it cannot be taken here that the word "*chancellor*" was only meant for a deſcription of the perſon, but rather an indication of the capacity in which he did ſuborn the witneſſes: and it is not material to ſhew, that any woman did ſwear againſt a parſon before him; for if there did not, then the greater falſity and ſcandal, and the word "*ſubornation*" is always taken in an ill ſenſe (*a*). The caſe of *Harris v. Dixon* (*b*) has been objected, where the words were, "Thou haſt procured *J. S.* to come thirty miles to commit "*perjury* before the *Lord Biſhop of Winton*, and gave him ſo much "money;" and reſolved that the action would not lie, becauſe it was not ſaid, that they did commit perjury; and therefore no offence. I anſwer, that this very caſe was adjudged actionable (*c*). In the caſe of *Prowſe v. Carey* (*d*), "Thou haſt procured falſe "witneſſes to ſwear in ſuch an action," were held actionable; for it ſhall be intended *in malam partem*. In the caſe of *Sir John Kirle v. Oſgood* (*e*), "He is a forſworn juſtice, and not fit to ſit on the "bench," ſpoken of a juſtice of peace, was held actionable. And words are to be taken according to their general acceptation; and the general acceptation of theſe words cannot be otherwiſe than criminal. In the caſe of *Sir J. Iſham v. York* (*f*), "I have often "been with *Juſtice B.* for juſtice, but could get nothing but "injuſtice at his hands," was held actionable; and it ſhall not be intended of any demand of private juſtice. Beſides, theſe words are ſpoke of one who deſigned to ſtand for *parliament-man*, and with intent to hinder his election; and he quoted the caſe of *Sir Walter Clarges* (*g*). To ſay of a man, that "he is a papiſt," though words not actionable in themſelves, yet they were adjudged actionable, becauſe ſpoke of one who ſtood for *parliament-man*. The like judgment in one *Stowell's Caſe* (*h*) ſince, where "You and "your crew brought the late king to death," were held actionable; though it might be ſaid, that they only attended him to the place of execution: yet becauſe the words found in ſcandal, and that the common acceptation and conſtruction of them muſt be, that they were concerned and buſied in bringing the king to death, he concluded for the plaintiff.

Yelv. 72. acc. Sed Cro. Car. 337. Cro. Jac. 151. con. See Skinner, 183. 364. Carth. 330. 400. 498.

POWYS, *Juſtice*, doubted how it would be if the words had no relation to his office, or were ſpoken of a man not in office; but he held them actionable here for theſe two reaſons, *viz.* that they were

(*a*) 3. Inſt. 167.
(*b*) Yelv. 72. 1. Roll. Abr. 51.
(*c*) See the report of this caſe, Cro. Jac. 158.
(*d*) Cro. Eliz. 93.
(*e*) 1. Vent. 50. S. C.
(*f*) Cro. Car. 15.
(*g*) Raym. 482. 3. Lev. 30. 3. Mod. 26. Skin. 68. 83. 1. Freem. 280.
(*h*) Hardres, 103.

ſpoken

ſpoken of a *public officer*, and in reference to his office; for he held, that the word "*chancellor*" was not a *deſignatio perſonæ*, or as his name, as *parſon* or *dean* is, but an *innuendo* of his corruption *quatenus* ſuch, i. e. *quatenus* a chancellor. And he denied the caſe in 1. *Roll. Abr.* 79. *p.* 2. but agreed the caſe of *Skinner v. Trobe* (*a*), "Thou art forſworn in *Collet-Court*," and *Page v. Keble* (*b*), "* Thou art perjured, for thou art forſworn in the "*Biſhop of G.*'s court," not to be actionable; and would diſtinguiſh thoſe caſes from this, becauſe ſpoken here of an officer, and with relation to his office. "*Subornation*" is a known term in the law, and is the word of art for corrupting one to commit perjury (*c*). The ſtatute of 32. *Hen.* 8. c. 9. ſpeaks of ſubornation of witneſſes; the ſtatute 5. *Eliz.* c. 9. ſubornation of falſe procurement of a witneſs. In the caſe of *Pugh v. Owen* (*d*) theſe words ſpoken of a juſtice of peace to his ſervant, "Your maſter's witneſſes "(in ſuch a cauſe) were perjured, and your maſter is a maintainer "and upholder of them," were held not actionable by RAINSFORD and TURNER, *Barons*, againſt HALE, *Chief Baron*, becauſe they did not relate to his office of juſtice, but were ſpoken as of a private perſon. And in *Moor* (*e*), ANDERSON, *Chief Juſtice*, ſays, A private man cannot be ſlandered but by particular words, but general words ſuffice to ſlander a magiſtrate. And he concluded for the plaintiff.

WALMSLEY *againſt* RUSSEL.

* [202]

Vide Cro. Jac. 158. 1. Danv. 107. 153.

POWELL, *Juſtice*, *contra*. FIRST, He agreed, that the phraſe of expreſſion was as direct as if the defendant had actually ſaid, that the plaintiff had ſuborned witneſſes to ſwear againſt the parſon. I cannot well find, whether my brothers think the words actionable in themſelves, if ſpoken of any perſon whatever, or by reaſon of a relation to his office, or other circumſtances of the plaintiff on the declaration; but I hold them not actionable upon any account without a relation to his office. A perſon cannot be a ſuborner of perjury without there be a perjury committed. One indeed may ſuborn to ſwear, and yet no oath be taken; or an oath may be taken, and yet it may be no perjury, for it does not appear to be in any court of juſtice. The caſe of *Skinner v. Trobe* (*f*) is not like this, for here is neither court or cauſe mentioned where the ſwearing was. He agreed the caſe of *Harris v. Dixon* (*g*), for there was a perjury ſaid to have been committed. And as to the caſe of *Pugh v Owen*, a perjury is likewiſe charged. It is not actionable to ſay, that one did forſwear himſelf; *à fortiori* how can the ſuborning one to forſwear himſelf be ſlander to bear an action? Subornation *ex vi termini* does not import a ſubornation of perjury; and the caſe in *Roll* (*h*) is much ſtronger than this. Subornation indeed is never taken in a good ſenſe, no more is forſwearing, yet no action lies for ſaying a man did forſwear himſelf. Then as to the relation of

1. Vent. 59, 60.

(*a*) Cro. Jac. 190.
(*b*) Cro. Jac. 436.
(*c*) 3. Inſt. 167.
(*d*) Hard. 501.
(*e*) Moor, 243.
(*f*) Cro. Jac. 190.
(*g*) Cro. Jac. 158.
(*h*) Anonymous, 1. Roll. Rep 79.

theſe

WALMSLEY *againſt* RUSSEL. Cro. Jac. 143.

theſe words to his office; or that he alledges himſelf to be a *juſtice of peace*, and candidate for *parliament*: I agree; words ſpoken of a magiſtrate will bear action that would not do ſo if ſpoken of another, but they muſt touch him in his office. If there had been a caſe in which a parſon had been party before the plaintiff, and women had been ſworn in it, and that had been ſet forth, then theſe words might be applied by *innuendo* to that; and therefore actionable (*a*). But the word "*chancellor*" does not neceſſarily import, that this was charged upon him in his *office of chancellor*. Words muſt be either actionable in their own nature, and bear an action if ſpoke of anybody, or they muſt ſcandalize him in office, &c. to bear an action.

* [203] * HOLT, *Chief Juſtice, accordant.* My brothers for the plaintiff are not well agreed, whether the words are actionable in themſelves, but rather incline that they are not; and I think they have great reaſon for that opinion, becauſe here is no charge upon the plaintiff of any ſubornation of perjury, or that he did ſuborn witneſſes to forſwear themſelves. Suppoſe it were the firſt, and no *colloquium* of any cauſe, or court where there had been an oath, it would not be actionable; nor is there any precedent for it, and there is reaſon that it ſhould not. To ſay a man has forſworn himſelf is not actionable; therefore to ſay that he has ſuborned witneſſes to forſwear is not. But the words are not ſo ſtrong in this caſe; for they are, that he did ſuborn witneſſes to ſwear. Surely the ſuborning of witneſſes to ſwear is no crime, for ſuborning *ex vi termini* is not a crime otherwiſe than as it relates to perjury; and ſuborning witneſſes to ſwear does not imply that they do ſwear. The caſe in 1. *Roll.* 79. lays a *colloquium* of a ſuit in chancery, and of witneſſes ſworn there; ſo that firſt one would think here was a ſubornation of perjury; and the words go farther, and ſay, that he would ſue in THE STAR-CHAMBER for it, a proper court to puniſh perjury in, yet it was held not actionable. Then how do theſe words touch him in his office? If a chancellor will ſuborn witneſſes to ſwear, does this relate to his office? If he do it in another than in a ſpiritual court, it cannot; if it be in a ſpiritual court, it may not be before himſelf: in ſhort, it does not appear to have been before himſelf, and we muſt not intend it to maintain an action. And the naming him "*chancellor*" is no more, and ſo commonly underſtood, than a *deſignatio perſonæ*, as *Mr. Chancellor*. To make words actionable in themſelves, it is neceſſary to charge ſome ſcandalous crime by them. If a communication had been laid concerning an oath which a man had taken in a court of juſtice, and that the man did forſwear himſelf, that had been charging him with perjury, and therefore actionable. But barely to ſay, that a man did forſwear himſelf, or ſuborn another ſo to do, is not charging an offence puniſhable, and therefore not ſufficient to ground an action. And he concluded for the defendant.

(*a*) Cro. Jac. 30. Yelv. 220.

And

And THE COURT being thus divided, the queſtion was about the judgment. If a rule be made for a cauſe to ſtay until the Court be further moved, and the Court is divided, there needs no new rule from the Court, and the plaintiff without more may enter judgment upon the verdict. But if the caſe be ruled to be put in THE PAPER for argument, or the laſt rule be a *Curia adviſare vult*, and the Court be divided, there can be no judgment: and the caſe of *Iveſon v. More* (*a*) ſtands upon that point to this day.

How judgment may or may not be when THE COURT is divided.

(*a*) 1. Salk. 15. S. C. Com. Rep. 58. S. C. 1. Ld. Ray. 486. S. C. Carth. 451.

* The Queen *againſt* London.

Caſe 295.

AN ORDER for payment of *labourers wages* recited the ſpecial matter thus:

An order of juſtices made on the 5. *Eliz.* c. 4. to pay the wages of a perſon employed by an overſeer of the king's works in daily garden work in the garden at *Hampton-Court*, is bad; for juſtices have only authority with reſpect to *wages in huſbandry*; and it appears on the face of this order that the party was a *journeyman*: but if an order be made for the payment of *wages generally*, the Court will intend it for *wages in huſbandry*.

Two perſons were retained by the defendant, being overſeer of the works of the king's garden at *Hampton-Court*, at ſo much a day, and employed in garden work there; and the order was made to enforce the payment.

The order was removed by *certiorari* from HICKS's-HALL.

IT WAS NOW MOVED *to quaſh it.* For the juſtices have no power by the ſtatute of 5. *Eliz.* c. 4. to order payment of the wages of *a coachman*, *footman*, or any other *labourer* or *ſervants*, but ſuch as are *labourers in huſbandry*: they cannot make orders upon *bricklayers*, *carpenters*, *&c.* works; but in caſe of *ſervants in huſbandry*, where the juſtices may ſettle their wages, and force them to ſerve by the act of parliament, they may compel payment; and the juſtices have power to regulate wages in abundance of caſes where they cannot compel payment; and the caſe of *The Queen v. Corbet* here before (*a*), and *Fitz. N. B.* 168. *Bro. tit.* "*Labour*," were quoted, and this diſtinction was taken. If the order had been generally for *wages*, there the Court would not intend it to be other than *wages in huſbandry*, and it might hold; but where on the face of the order it appears otherwiſe, as here it does, it is in itſelf void, as touching a matter whereof they have no juriſdiction; and indeed it does not appear that this was for wages ſettled by juſtices, and they never did pretend to a juriſdiction but where the wages was ſettled by them. Then this is a queſtion of juriſdiction, and acts of parliament concerning juriſdiction ought to be taken ſtrictly, and all the matter of equity that may be urged on the other ſide is ſhut out by this one anſwer, that it is againſt a poſitive law.

S. C. 3. Salk. 261.
S. C. 2. Salk. 442.
S. C. Sett. & Rem. 231.
Skinner, 80.
Dyer, 265. a.
Jenk. 135.
9. Co. 88.
Moor, 698.
1. Brownl. 62.
2. Jones, 47.

BROTHERICK *contra.* This juriſdiction has been exerciſed by them ever ſince the making of the ſtatute, which is a great argument of right. He quoted *the King and Queen v. Jammer* (*b*),

5. Mod. 419. Carth. 156. 1. Stra. 2. 8. Forteſ. 327. 2. Stra. 1002. Ld. Ray. 820. 1305. 4. Com. Dig. "Juſtices of Peace" (B. 60.).

(*a*) Ante, 91. (*b*) Eaſter Term, 3. *Will. & Mary.*

where

THE QUEEN *againſt* LONDON.

where it did not appear to have been a ſervice in huſbandry; and there it was held, they could enforce their order by commitment; and he inſiſted, that work in a garden was a ſervice in huſbandry; and they have always been allowed a juriſdiction of that caſe: and taking the ſeveral clauſes of the ſtatute together, they neceſſarily intend to give remedy by the juſtices in all caſes of this kind. By 5. *Eliz.* c. 4. ſ. 7. and 15. they are to fix and ſettle wages and day-hire of labourers, and ſo of apprentices in huſbandry. By 5. *Eliz.* c. 4. ſ. 14. a party retained ſhall not go, if he be duly paid, till the work be finiſhed, under penalty of a month's impriſonment, to be inflicted by the juſtices. By 5. *Eliz.* c. 4. ſ. 18. they are to convict maſters for keeping contrary to the act. By 5. *Eliz.* c. 4. ſ. 37. all juſtices are required to make ſpecial and diligent inquiry into the breaches made of any of the branches of this ſtatute. If then by this ſtatute they are to aſcertain wages and day-hire, to examine and puniſh maſters that give more, or ſervants* that will take more, than the eſtabliſhed rate, if a ſervant cannot quit his maſter without leave, but that they may puniſh him, and that all offences contrary to this act are determinable by the juſtices, Why ſhall not they, by virtue of thoſe comprehenſive words, compel payments of ſuch ſervants and labourers wages?

* [205]

HOLT, *Chief Juſtice.* Two queſtions may well ariſe here.—FIRST, Whether the defendant be bound to pay thoſe wages at all? for if he be employed as *a ſurveyor* of this work, and bring in others, and agree with them, it may well be that he ſhall be chargeable by them: as if I put out cloth to a taylor, and he employs journeymen to make it up, he, and not I, ſhall pay them, and he by me is to be paid for the whole work. It may be, on the other hand, that the contract was not made by the defendant upon his own credit, but upon the credit of THE CROWN; and neither appears on the order, but it only ſays that the retainer was by him. —SECONDLY, Suppoſe the contract be with him, and upon his credit, Whether *a gardener* working for day-labour in a garden be within the power given to the juſtices in point of payment of his wages? And what ſticks with me is, why they ſhould have power over wages and day-labour in huſbandry, and not in caſes of other labourers. You ſay, that it is, by implication, the ſame, becauſe of the powers given to them by the ſtatute over ſuch labourers. And he remembered an order made upon my *Lord Oſſulſton*, for his coachman's wages, which was quaſhed; and ſaid, Surely they cannot order a journeyman taylor his wages or hire; and their having exerciſed this juriſdiction all along will not make it legal, if without foundation; and in that reſpect it is not like a ſuit in the admiralty for *ſeamen's wages*, for that may ſtand upon this reaſon: The admiralty is a court time out of mind, and it may be by ancient cuſtom they have juriſdiction over ſeamen's wages; but this here is a juriſdiction ſet up within the memory of man. Eccleſiaſtical courts have juriſdiction of wills and teſtaments, not by *commune jus*, but by preſcription, and no act of parliament

parliament is to give them jurisdiction. But it is said in *Henshoe's Case*, and so in *Selden*, that it was given to them by the laws of the kingdom, and it is not so any where but in *England*: so since the case of *seamen's wages* was always determinable in the admiralty, we must now understand that it had a legal commencement.

THE QUEEN *against* LONDON.

And at another day, the order was quashed PER TOTAM CURIAM, for that it appeared upon the face of it not to be for *labour in husbandry* (*a*). But if that had not appeared so, we would perhaps intend it *husbandry* (*b*); but now there is no room for such an intendment.

(*a*) See the statute 20. *Geo.* 3. c. 19. recited in the case of Rex *v.* Pope, 5. Mod. 419.

(*b*) But see Rex *v.* Helling, 1. Strange, 8.

* [206]

* Carleton *against* Mortagh.

Case 296.

Michaelmas Term, 2. Anne, Roll 76.

If a writ of error be brought on a judgment in the king's bench, and the *want of an original* be assigned for error, and the defendant plead *a release of errors*, but do not lay *a venue* where the release was made, the plea is, for this reason, bad on demurrer; but THE COURT may award A CERTIORARI *ad informandum conscientiam Curiæ* whether there was *an original* or not, in the same manner as after "*in nullo est erratum*" pleaded; but the defendant cannot demand this writ.

ERROR OF A JUDGMENT in debt by confession in the common pleas. The *want of an original* was assigned for error and certified. The defendant pleaded *a release*, but no *venue* was laid; whereupon the plaintiff demurs.

The great question now was, Whether the Court, being informed that there was *an original* below, could by law award a *certiorari ad informandum conscientiam Curiæ* before they reversed a judgment for a just debt?

GOULD, *Justice*. We may do it; and this case stands upon its own foot, and distinguished from other cases. In all cases where the Court after demurrer over-ruled against the defendant, or ruled for a plaintiff in error, or let in to examine the record for error before reversal of the judgment, they ought to award a *certiorari* to have the whole record below before them, though now the defendant cannot of right demand it; for notwithstanding any confession or other plea of the defendant admitting error, yet if no error appear to the Court on examination of the record, they shall affirm the judgment. "If a fact be pleaded in bar of "error, as a feoffment or release," says THE YEAR-BOOK of *Edward the Third* (*a*), "and issue is taken thereupon, and found for the "plaintiff," which is this very case, "yet the Court shall examine the "judgment; and if no error appear to them therein shall affirm it." And though error be assigned in the want of an original, yet since there may be an original below, the Court, upon their examination of the record, cannot be barred from awarding a *certiorari* to be

S. C. ante, 113. S. C. 1. Salk. 268. S. C. 3. Salk. 399. S. C. Holt, 275. S. C. 2. Ld. Ray. 1005. Post. 235. Noy, 83, 84. Lat. 152. 1. Sid. 39. 1. Lev. 99. 1. Keb. 225. Farefl. 104. 1. Show. 213. Ante, 113. 134. 174. Carth. 70. 200. 339. Post. 235. 8. Mod. 31. 327. 331. 10. Mod. 318. 12. Mod. 320. Stra. 765. 819. 5. Com. Dig. "Pleader" (B. 13.). (3. B. 19.). Stra. 440. 3. Peer. Wms. 315.

(*a*) 21. *Edw.* 3. pl. 54.

CARLETON against MORTIMER.

certified thereof. It is true, formerly, as appears by 28. *Hen. 6. pl.* 10. it has been held, that after "*in nullo est erratum*" pleaded the Court would and ought not to inquire farther, and that the whole record must be presumed to be laid before them; but since that time the Books are very full, that after "*in nullo est erratum*" pleaded, though a wrong original be certified, the Court may be informed that there is a right original, and they *ex officio* ought to award a *certiorari* for it to affirm the judgment (*a*); as in *Bishop's Case* (*b*), which in truth was after a *nil dicit et remanet indefens.* though *Coke* (*c*) reports it to be after *in nullo est erratum.* And this I take to be a strong authority for me, for the release in our case does not confess more than that does, and yet there the Court granted a *certiorari.* In some Books, it is said to be discretionary in the Court to do it or not; and if so, can we have a better motive of our discretion than here to affirm a judgment for a just debt, where a release of error is unfortunately ill pleaded? And he concluded for a *certiorari.*

POWYS, *Justice, accord.* It has been held formerly, that "*in nullo est erratum*" was a demurrer on what was produced of the record; but in 9. *Edw.* 4. 32. *b.* it was adjudged, that the Court may at discretion send a *certiorari* after *in nullo est erratum* pleaded; and *Bishop's Case* allows that, and *Jo.* 140. * and *Latch*, 152. that after the plea pleaded the party cannot pray a *certiorari*, and if he do it shall not go at all; and the entry ought to be that it was "By the Court," and not at prayer of party: and there is no difference between this and *in nullo est erratum* in point of reason, for one is matter of law, and the other matter of fact: And why should it be when the issue in law is against him, and not when the issue in fact is? And in those Books it is said, that the Court may send a *certiorari* as well to reverse as to affirm, after *in nullo est erratum.*

* [207]

1. Leon. 22. Noy, 83, 84. 1. Sid. 109. Vide 1. Co. 36. 5. Co. 37.

POWELL, *Justice, accord.* The release being as none, because not well pleaded, does not tie our hands, but we may award a *certiorari* to know whether this be error or not: and the Court may do it to be informed of any error in law, where they are not foreclosed by the act of the party; and this is such. And wherever the Court are not barred from examining the errors on the record, they may inform themselves thus of the true state thereof, though the parties have foreclosed themselves of that advantage by pleading or confession; for they must affirm or disaffirm the judgment, upon view of the whole record, according to their knowledge and conscience, without regard to the party's admission; and therefore they ought to know of their own knowledge whether there be error in law, and not to rely upon the party's admission. The case in the time of *Edward the Fourth* (*d*) is the first that I find in the Books of *certiorari's ex officio Curiæ*, and there the parties

(*a*) See Year-Book 1. *Edw.* 4. pl. 25. 1. Roll. Abr. 764, 765.
(*b*) Cro. Jac. 60. Latch, 152. 1. Jones, 139.
(*c*) 5. Co. 36.
(*d*) Year-Book 1. *Edw.* 4. pl. 32.

agreed

agreed the record as removed, to be perfect, and yet the Court awarded a *certiorari*. And I cannot tell but in many cases the Court are bound to do it, especially to affirm a judgment. It cannot be at the prayer of the parties, because they have estopped themselves by their plea, and in some cases the Court have denied it to reverse a judgment. In the case of *Young v. Young* (*a*), an infant brought an original; in which case he need not find pledges; but if he come of age before judgment, he ought to add them; and that being the case, "want of pledges" was assigned for error; and there the Court would not grant a *certiorari* to make error; and with this agrees the case of *Felton v. Weaver* (*b*). The difference is between the case of the plaintiff in error and of the defendant. If the plaintiff assign error, and take a *scire facias ad audiendum errores*, and that it is returned "*served*," and then the plaintiff is nonsuited, or enters a *retraxit*, the Court without more will affirm the judgment (*c*). Another difference is between errors in law and errors in fact: If error in fact be alledged, and "*in nullo est erratum*" pleaded to it, or a release, and that is found against the pleader, it is a confession of the error, and the Court thereupon shall, without more, reverse the judgment; but pleading a release of an error in law is not so, for a release will not make that error that is not so, as appears to the Court on record; but the release there is only a bar of the vexation of the suit of the writ of error, for the Court cannot proceed but upon a writ of error, and the release may bar that; but if a release be pleaded which does not bar the writ, the Court may proceed to examine the record; and so is the case in the time of *Edward the Third* (*d*). * And where-ever they can go to examine errors, there they must take all legal ways to be informed of the whole record. And he quoted the case of *Done v. Smithers* (*e*). And as to *Bishop's Case* (*f*), as reported by *Coke*, it was after "*in nullo est erratum*" pleaded, but there the party took out a *certiorari* without leave of Court and they held, that he could not have that writ after that plea, whereby he had concluded himself, but that the Court might *ex officio* award it; and though it was annexed to the record by the act of the party, yet the Court took it off, and awarded one themselves. As to the difference between error in fact and in law, it appears (*g*) that error in fact may be confessed, but that error in law cannot, so as to tie up the hands of the Court; for though the party do confess the want of a writ original, *capias*, &c. the Court cannot take his word, and reverse the judgment, but they must inspect the record, and be informed (*h*). And the form of entries in case of awarding *certiorari ex officio* is *quia expediens Cur. videtur*, to know whether there be such a writ or not (*i*). It is objected, that the nature of this error is such as may be confessed, for it is

CARLETON against MORTAGE.

12. Mod. 560.

* [208]

1. Cro. 84. Mo. 700. 1. Leon. 22. Yel. 127, 128. 1. Roll. 754. 755. 1. Keb. 225.

Ante, 194.

(*a*) Palm. 520.
(*b*) Latch, 152. S. C. Jones, 239. S. C. Noy, 83.
(*c*) Year-Book 21. *Edw.* 4. pl. 38, pl. 39. pl. 44.
(*d*) Year-Book 21. *Edw.* 3. pl. 54.
(*e*) 1. Jones, 352. 373. Cro. Car. 415.
(*f*) Cro. Eliz. 497. S. C. Goulds. 152.
(*g*) Year-Books 7. *Edw.* 4. pl. 16. Bro. Abr "Error," 165. Fitz. Abr. "Error," 4.
(*h*) See 4. Burr. 2552.
(*i*) Skinner, 419. to 422.

CARLETON *against* MORTAGH.

only whether there may be such a writ or no? But I answer, it is matter of law, whether there be *an original* in the cause or no. And he concluded to award the writ.

HOLT, *Chief Justice, contra.* I am glad my BROTHERS can be against me in this case for supporting a judgment, but I am sorry that I cannot agree with their reasons.

FIRST, Because the question now before us is not whether there be error or no, but whether the plea in bar be good as pleaded. When error is assigned, and "*in nullo est erratum*" pleaded, or a default is made, there the matter of error is the question before the Court; but now the matter put in our judgment is, whether the plea be good or not; so that now we are determining another question than is in judgment before us. If "*in nullo est erratum*" be pleaded, or a default made, no doubt the Court may award a *certiorari*. In the case of *Done v. Smithers (a)*, that which was assigned for error appeared to the Court to be no error; then the matter pleaded in bar of that error, though against the defendant, was impertinent, because it appeared to the Court to be no error. If in debt upon a bond the declaration be bad, and the plea in bar be so too, yet judgment shall not be for the plaintiff upon the bad bar, but against him, because the declaration appearing to be bad, the bar is insignificant (*b*). So in a writ of error, if a release be pleaded, and issue thereupon found for the plaintiff, and there appear no error on the record, the judgment shall be affirmed (*c*), because the Court are to judge of the whole record before them. If a bad plea in bar be pleaded to a bad declaration, or to a bad assignment of error, it is idle, and the Court shall take no notice of the insufficiency of it, but shall judge on the record. And so agrees * [209] the case in the *Year-Book* (*d*); for notwithstanding a * release found for the plaintiff in error, yet, if there be no error, the judgment shall be affirmed; but here is apparent error, *viz.* the want of an *original* in an action in the common pleas. Suppose then the defendant had not come in *gratis*, and pleaded a release, but the plaintiff had assigned errors, and taken out a *certiorari*, and it were certified that there was no *original*, and then the defendant had come and pleaded the release, as here, you would not, in that case, have granted a *certiorari*, and yet you might as well do it then as now; for now the defendant by coming in *gratis* saves the plaintiff the trouble of a *certiorari*, and admits error, but pleads a release: So it appears to the Court, that there is a good and substantial error, and that the defendant has not barred it by his plea, therefore it is not in judgment before the Court whether there be error or not, there being apparent error on the record before them.

Vide Keb. 225. 2. Cro. 443. Godb. 407.

SECONDLY, This is a demurrer to the plea in bar, and the whole event of the cause is put in judgment upon the demurrer. When there is a demurrer and joinder in it, the Court is bound to

(*a*) 2. Jones, 352. 373. Cro. Car. 415.
(*b*)
(*c*)
(*d*) 21. *Edw.* 3. pl. 54.

give

give judgment upon that; now if you award a *certiorari* here, you ſtrike the plea, the demurrer and the joinder in it out of the caſe, and was ſuch a thing ever done? If it be certified that there is *an original*, what will become of the demurrer? For if you give judgment upon *certiorari* you muſt ſet aſide the demurrer, for you cannot give judgment upon both; for if you do, you muſt give it for the defendant upon the *certiorari*, and for the plaintiff on the demurrer; a manifeſt contradiction. If an original be certified, and you give judgment for the defendant, you muſt waive the demurrer put to your judgment by the conſent of the parties: and no caſe is parallel to this; for conſider, you are not upon the iſſue of error or no error, but upon the point of bar or not, for that is what the parties demand your judgment in. 2. Keb. 27. pl. 21.

THIRDLY, The want of *an original* is confeſſed here as flatly as can be. Indeed the aſſignment of error is not complete until a *certiorari* is returned for the plaintiff; and here you for the defendant have prevented him of that by coming in *gratis*, and admitting the want of an original; but depend upon it he ought not to aſſign error, becauſe of his releaſe. So he having admitted it in this manner, both parties demand judgment upon the releaſe; and for the Court to go upon another point than what is put in their judgment by both parties, is a kind of a departure from the point in iſſue. In the *Year-Book* (*a*), it is ſaid *arguendo*, that if error be aſſigned out of the record, as the want of an original, or the like, though the defendant confeſſes this error, the Court are not bound by ſuch confeſſion; and that I agree, if the queſtion be, whether error or not, as in an *in nullo eſt erratum* pleaded, or in default to the *ſcire facias*, which are not full admiſſions, but *quaſi* admiſſions, and not near ſo full as pleas in bar; but where the defendant agrees that there is error, but inſiſts upon it that the plaintiff releaſed it, the Court does not go ſo far as to ſay, that they may ſcruple, and ſend a *certiorari* there too. If the defendant in error come in before any *certiorari*, and plead a bar, and a demurrer is thereunto, and it never was queſtioned but he * might well do ſo, it would then be the ſame thing as if it had been certified "*no original.*" If ſo, ſuppoſe, inſtead of a demurrer, iſſue had been upon this plea, and found for the plaintiff, would you in that caſe award a *certiorari*? Yes: you muſt maintain it, that you are at liberty, even after a verdict, to try whether the trial was to any manner of purpoſe: And what will the conſequence of theſe things be? No doubt, after "*in nullo eſt erratum*" pleaded, the Court may grant it, though the party has foreclo'ed himſelf from praying it; but if the Court be informed matters are right below, I think, *ex debito juſtitiæ* in that caſe, they are bound to ſend for it; and where they can do, I ſay, I think, *ex debito juſtitiæ*, they ought to do it. It has been ſaid (*b*), they could not do it to reverſe a judgment; though there are other opinions to

* [210]

1. Keb. 91. 111. as 5.

(*a*) 7. *Edw.* 4. pl. 16. (*b*) Cro. Jac. 6. 241. 1. Jones, 141.

CARLETON *againſt* MORTAGH.

Cro. Jac. 6. 141. 1. Jo. 141. that it be in both caſes.

the contrary (*a*), it was granted: ſo is *Croke* (*b*), that if THE PLEA-ROLL be certified, and it appears to be erroneous, the defendant, before *in nullo eſt erratum* pleaded, may alledge *diminution*, and get THE ROLL amended below, and certified up hither, and an amendment may be below in the body of the record, even after *in nullo eſt erratum* pleaded; and that is the reaſon that upon *diminution* alledged, we order the clerk of the treaſury to attend, where there is an erroneous judgment through the fault of the clerk, as in the late caſe of *Morriſon v. Fanſhaw* (*c*), where the judgment was in a *ſcire facias* upon a recognizance upon a writ of error for coſts for delay of execution, the right formal way had been to have it amended below, and to ſend a *certiorari* to have it ſent up as amended; but we take a ſummary way, deſiring them to get it amended below, if it may be; and, upon the clerk's coming up, it is ſet right here. And he quoted the caſe of *Gwyn v. Gwyn* (*d*) thirty years ago: judgment was in *Wales*, "therefore "it is conſidered, &c. *quod querens teneat*," inſtead of *recuperet*; and this was held to be error, and great endeavours made to have it amended; the docket book was right, and the Court ſaid, if the docket had been made they would amend by it; and he put the caſe of *Done v. Smithers*.

(*a*) Cro. Eliz. 836, 837.
(*b*) Cro. Jac. 445.
(*c*)
(*d*) Cro. Car. 301. S. C. Godb. 448. S. C. 1. Keb. 495. 543. 537. 626. S. C. 1. Sid. 138. S. C. 1. Lev. 99.

Caſe 297. Anonymous.

Keeping open ſhop on a faſt-day is an indictable offence; but each offender muſt be ſeparately indicted. Hob. 251.

SEVERAL houſe-keepers, being *Quakers*, were indicted for keeping their ſhops open on a day ordained by proclamation for a public humiliation and prayer.

And becauſe they were ſeveral diſtinct crimes in every diſtinct offender, and therefore not to be joined in one indictment, it was quaſhed.

Caſe 298. Powell *againſt* Ball.

To hinder a bailiff from arreſting a man is a contempt of the Court.

IF A BAILIFF has a warrant to arreſt a man, and another hinder him from doing it, there being no actual arreſt, it is not a *reſcous*, yet it is a *contempt of the Court* (*a*).

Ante, 105. 173. Poſt. 211. 1. Cro. Eliz. 909, 910. 753. Yelv. 28. 2. Roll. 254. Hob. 62. 263. Owen, 63. 11. Co. 82. 12. Co. 131. Cro. Car. 537, 538. Cro. Jac. 280. 556. 436. 12. Mod. 347.

(*a*) See Wilſon *v.* Gray, Poſt. 211.

* Anonymous. Case 299.

PER CURIAM. Where *a view* is proper, there, upon motion before trial, we will grant it, in like manner as we uſed at THE ASSIZES, and that is after the jury is ſworn, and then it muſt be by conſent, and a juror withdrawn. Rule, upon granting *a view*. 2. Salk. 665. 1. Show. 3. 2. Lev. 117. 1. Burr. 252.

HOLT, *Chief Juſtice.* I think we may award *a view* without conſent. And notwithſtanding this view, a juror may be challenged when he comes to be ſworn (*a*).

(*a*) See the ſtatute 4. *Anne*, c. 16. and 3. *Geo.* 2. c. 25. § 34. and the regulations made by the Court upon theſe ſtatutes concerning *views* in civil actions, 1. Burr. Rep. 252. to 259.

TRINITY TERM,

The Third Year of Queen Anne,

AT

The Sittings in Middleſex,

BEFORE

Sir John Holt, *Knt. Chief Juſtice*

OF

THE COURT OF QUEEN's BENCH,

Wilſon *againſt* Gary. Caſe 300.

AN ACTION ON THE CASE for reſcuing a perſon arreſted on *meſne proceſs* at the plaintiff's ſuit.

In caſe for *reſcue* upon *meſne proceſs*, the plaintiff muſt prove the original cauſe of action, the writ and warrant, and a legal arreſt.

S. C. Holt, 628. 1. Salk. 79. 2. Salk. 587. Ante, 173.

THE FIRST POINT of evidence was the original cauſe of action.

THE SECOND POINT of evidence was, the writ (*a*) and warrant, by producing copies of them ſworn to be examined and true (*b*).

THE THIRD POINT of evidence was, the arreſt, ſhewing the manner of it, that it might appear to the Court to have been legal, for otherwiſe there could be no *reſcous*.

And, FOURTHLY, in point of damage, they proved the loſs of their debt, for that the priſoner became inſolvent, or could not be had.

But though *expedient*, it is not *neceſſary* to prove the *loſs of the debt*. Ante, 141. 210. Eſpinaſſ. 657.

But as to that, HOLT, *Chief Juſtice*, ſaid, in caſe of *reſcous* you ſhall have no favour, becauſe guilty of a violence againſt the

(*a*) See Blatch *v.* Archer, that in an action of debt for an eſcape againſt the ſheriff, the indorſement of *non eſt inventus* upon the *capias ad ſatisfaciendum* is ſufficient evidence of its being delivered to the ſheriff. Cowp. 63.

(*b*) See Blatch *v.* Archer, Cowper, 63.

proceſs

Wilson *against* Gary.

process of the law, and therefore not like the case of a negligent escape.

Quere, Whether an arrest by the *bailiff's servant* be good.

Vide Pa. 210. Bull. N. P. 63. 4. Com. Dig. "Execution" (C. 12.). 1. Bac. Abr. 232.

NOTE, The case upon evidence appeared thus: The bailiff stayed below at the street-door, and sent his follower with the warrant up three pair of stairs in disguise, who there laid hands on the prisoner, and told him, he arrested him: the prisoner, with the assistance of some women, got from him, and run down to the first floor; and the defendant being below in his shop, and hearing the noise, ran up before the bailiff, opened the door, and put the prisoner in, and would not suffer the bailiff to go and take him (*a*).

And HOLT, *Chief Justice*, seemed to doubt whether this were a good arrest, being only by the plaintiff's servant, or if it had been done by the servant even in the bailiff's presence (*b*), but yet charged the jury generally, who found for the plaintiff.

But he ordered THE POSTEA to be stayed till he had marked it.

In an action for a rescue the party rescued is a competent witness.

3. Mod. 124, 125. 1. Stra. 649. 12. Mod. 338. Ld. Ray. 369. 730. 2. Stra. 828. 1229. 1043. 1104.

HERE the party rescued appeared, and was sworn as a witness for the defendant, not being made party to the action:—which HOLT, *Chief Justice*, *hæsitanter*, allowed, upon the reason that he swore to charge himself, if by his evidence he discharged the defendant; but he said, it was what he never had seen before, and that if the defendant was guilty of the *rescous*, he could not but be *particeps criminis*: however, he was sworn, and his credit left with the jury.

(*a*) A bailiff, in execution of *mesne process*, may break open the door of a lodger's apartment, having first gained peaceable entrance at the outer door of the house, Lee *v.* Gansel, Cowp. 1.

(*b*) The arrest must be made by the *authority* of THE BAILIFF, but he need not be the hand that arrests, nor in the *presence*, nor actually in sight, nor within any precise distance, of the person arrested, Blatch *v.* Archer, Cowp. 65.

Case 301.

*The Queen *against* Middlemore.

An indictment against several for a *misdemeanor* may be tried against *some* only, on the others entering into a rule to plead *guilty* if their co-defendants are convicted.

A GREAT NUMBER OF PEOPLE were indicted for a riot.

It was moved, that the prosecutor should pitch upon three or four of them, and try it only against them, the rest entering into a rule, that if they were found guilty to plead guilty too.

And this was said to be done frequently, to prevent the charges of putting them all to plead.

And the rule was so.

1. Hawk. cap. 65. Blackerby's Cases, 211, 212, &c. 4. Com. Dig. 406.

Anonymous.

Anonymous. Case 302.

IF JUDGMENT upon a warrant of attorney be not entered within the year, it cannot be without leave of Court on motion.

Judgment upon a warrant of attorney, whereto

be entered. Ante, 14. 191. Post. 288. Ld. Ray. 850. Stra. 639. 718. 882.—See Luthington v. Walker, 1. H. Bl. Rep. 94.

Baldwin *against* Cole. Case 303.

TROVER. The case, upon evidence, was this:

A carpenter sent his servant to work for hire to the queen's yard; and having been there some time, when he would go no more, the surveyor of the work would not let him have his tools, pretending a usage to detain tools to enforce workmen to continue until the queen's work was done. A demand and refusal was proved at one time, and a tender and refusal after.

A demand of goods by, and a *refusal* to restore them to, the right owner, is not merely an *evidence*, but an *actual conversion* of them.

S. C. Holt, 707. 1. Lev. 173. 10. Co. 56. 1. Cro. 262. 2. Salk. 655. 1. Danv. 22. L. 2. 2. Mod. 245. 3. Mod. 2. 5. Mod. 426. 2. Show. 148. 175. b. 213. 5. Bac. Abr. 259. Comy. Rep. 157. 8. Mod. 177. 322. 12. Mod. 344. Stra. 60. 128. 142. 505. 576. 652. 1078.

HOLT, *Chief Justice*. The very denial of goods to him that has a right to demand them is an actual conversion, and not only evidence of it, as has been holden; for what is a conversion, but an assuming upon one's self the property and right of disposing another's goods, and he that takes upon himself to detain another man's goods from him without cause, takes upon himself the right of disposing of them: so the taking and carrying away another man's goods is a conversion: so if one come into my close, and take my horse and ride him, there it is conversion: and here if the plaintiff had received them upon the tender, notwithstanding the action would have lain upon the former conversion, and the having of the goods after would go only in mitigation of the damages: and he made no account of the pretended usage, but compared it to the doctrine among the army, that if a man came into the service, and brought his own horse, that the property thereof was immediately altered, and vested in the queen; which he had already condemned.

And here one of the particulars in the declaration being ill laid, the defendant was found *not guilty* as to that, and *guilty* as to the rest.

TRINITY

TRINITY TERM,

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*
Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*
Edward Northey, *Eſq. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

* The Queen *againſt* Foxby.

Caſe 304.

On a writ of error on an indictment for being a *common ſcold*, if the defendant be ſo ill that ſhe cannot aſſign error in perſon, the Court, on affidavit, will enlarge the time.

SHE brought a writ of error of a judgment againſt her upon an indictment for being *a common ſcold*; and upon affidavits, that ſhe was ſo ill, that without danger of her life ſhe could not come up out of *Kent*, where ſhe lived, to aſſign error in perſon, according to the courſe of the Court,

BROTHERICK and WELLS moved, that ſhe might have leave to aſſign error by her clerk in court.

And WELLS ſaid, he knew no law for ducking of ſcolds (*a*).

PER CURIAM. Scolding once or twice is no great matter; for ſcolding alone is not the offence, but it is the frequent repetition of it to the diſturbance of the neighbourhood which makes it *a nuſance*, and as ſuch it always has been puniſhable in the leet, and therefore indictable (*b*). And we have of late indulged people upon writ of error of judgments on indictments to appear by attorney.

S. C. ante, 11. 178.
S. C. poſt. 239.
S. C. 1. Salk. 266.
S. C. Holt, 274.
4. Com. Dig. "Leet" (L. 3.).

And here they enlarged the time until the next Term, to ſee how ſhe would behave herſelf in the mean time: for HOLT, *Chief*

(*a*) Ante, 11. 178. 1. Hawk. P. C. ch. 75. ſ. 14.
(*b*) See 2. Roll. Abr. 79. 1. Mod. 71. 288. 1. Hawk. P. C. c. 75. ſ. 5.

Juſtice,

THE QUEEN *againſt* FOSBY.

Juſtice, ſaid, that *ducking* would rather harden than cure her; and if ſhe were once ducked, ſhe would ſcold on all the days of her life.

Vide poſt. 239. And in *Michaelmas Term* her huſband and ſhe came into court, and BROTHERICK moved, that they might aſſign error, which they did.

Caſe 305. The Inhabitants of the Pariſh of Weſtbury in Wilts *againſt* The Inhabitants of Coſtham.

If a woman with child be fraudulently removed from *A.* to *B.* and be delivered at *B.* and the order is afterwards quaſhed, the child is not ſettled at *B.*

S. C. 1. Salk. 121. S. C. 2. Salk. 532. S. C. Sett. & Rem. 146. S. C. Holt, 580. Salk. 474. 2. Bulſt. 349. Stra. 51. 438. 580. 831. Ld. Ray. 395. 471. 1332. 1473.

A POOR WOMAN with child was removed by order of two juſtices from *Weſtbury* to *Coſtham*, and before the ſeſſions brought-to-bed there, and then the order was quaſhed upon appeal.

PER CURIAM. The child is legally ſettled in the pariſh of *Weſtbury*, from whence the mother was illegally removed, for they ſhall not take advantage of their own wrong; and ſo it would have been if they had not known of the woman's being with child at the time of the wrongful removal. If a woman with child be travelling without fraud of the pariſh in which ſhe is ſettled, and in ſuch travel is delivered of her baſtard, it ſhall in that caſe be ſettled where it was born, *ſecus* if there be fraud; and according to this was quoted the caſe of the *Pariſh of Bewham* in *Eſſex* ſome years ago.

An order of baſtardy on a married woman muſt ſhew that her huſband is *dead*.

NOTE, Alſo it appeared upon the order of removal, that the woman had a huſband who had left her ſeven years before, but it was not ſaid that he was dead, ſo that it could not be *a baſtard* clearly (*a*).

SO, PER CURIAM, both points were clearly againſt the pariſh of *Weſtbury*.

(*a*) See Rex v. Albert Alverſtone, Carth. 469. S. C. Ld. Ray. 395. S. C. 5. Mod. 419.; Rex v. Murray, 1. Salk. 122.; Rex v. St. Bride's, 1. Stra. 51.; Rex v. Reading, Caſes T. H. 79.; Rex v. Bedall, 2. Stra. 1076.; Rex v. Rooke, 2. Wilſ. 340. and Mr. Cook's edit. Bott's P. L. vol. i. page 394. to 402. But ſee the caſe of Rex v. The Inhabitants of Lubbenham, 4. Term Rep. 451. and Goodright v. Saul, 4. Term Rep. 356.

TRINITY TERM,

The Third Year of Queen Anne,

AT

Sittings

BEFORE

Sir John Holt, *Knt. Chief Juſtice*

OF

THE COURT OF QUEEN's BENCH.

* Tracy *againſt* Talbot.

Caſe 306.

REPLEVIN. The caſe upon evidence before HOLT, *Chief Juſtice*, at *niſi prius*, was this:

If a houſe originally entire, be divided into ſeveral apartments, with an outer door to each apartment, and no communication with each other, the ſeveral apartments ſhall be rated as diſtinct manſion-houſes; but if the owner live therein, all the un-tenanted apartments ſhall be conſidered as parts of his houſe.

S. C. 2. Salk. 532.

The plaintiff having been *a lodger* in the pariſh for ſome time before, took part of a houſe there on the *third of December*, and was rated to the pariſh as an inhabitant for the quarter expiring at *Chriſtmas*. Before *Chriſtmas*, the diſtreſs was taken for the rate, by virtue of a *general warrant* made long before for *the whole year*;

FIRST in reſpect of ſeparate tenements chargeable to the pariſh.

HOLT, *Chief Juſtice*, ſaid, One houſe originally entire and undiſtinct, may become ſeveral and diſtinct, by dividing it into diſtinct partitions, and allotting them diſtinct avenues, ſo as the ſeveral inhabitants have no communication one with another (*a*); and in that caſe, if the owner of the houſe live in one of the ſeparate apartments himſelf, and an inhabitant of another ſeparate apartment go away, that tenement which he occupied is not now an empty tenement, but the poſſeſſion of it devolves upon the owner, and that, with the tenement in his poſſeſſion before, make

S. C. 2. Salk. 260. S. C. Sett. & Rem. 235. S. C. Holt, 581. S. C. Foley, 15.

(*a*) See Lee *v.* Ganſel, Cowp. 1.

now

TRACY *againſt* TALBOT.

now but one entire tenement, for which he is rateable to the pariſh (*a*). But if there be two ſeveral tenements originally, and they become inhabited by ſeveral families, who make but one avenue for both, and uſe it promiſcuouſly; yet, in reſpect of the original ſeverally, they continue ſeverally rateable.

An inhabitant who comes into a pariſh in the middle of a quarter, cannot be rated for the whole quarter.

But two points were allowed by HOLT, *Chief Juſtice*, to be found ſpecially.

FIRST, Whether if an inhabitant come into a pariſh three weeks before quarter-day, he can be rated to the pariſh for the whole quarter?

Ld. Ray. 798. 1009. 1013. 1280. Stra. 77. 56. 100. 393. 526. 630. 1071. 1114.

SECONDLY, Whether the diſtreſs could be taken by virtue of a *general warrant* made before the rate?

And yet he was very clear in the negative in both points.

FOR, FIRST, By the ſtatute 43. *Eliz.* c. 2. poors rates are to be made *monthly* (*b*), and the reaſon is, becauſe of frequent changes of poſſeſſion, in reſpect whereof only one is rateable; whereas at this rate, none could remove in the midſt of a quarter without being doubly chargeable (*c*).

A diſtreſs cannot be made for a rate by a warrant iſſued before it is due.

SECONDLY, He held, in no caſe one could be taken up by virtue of a warrant made before the offence committed, or by virtue of a *general warrant*, but where the taking would be juſtifiable without any warrant at all, other than a warrant in law.

Diſtreſs may be for a quarter's rate before end of the quarter.

A THIRD POINT which HOLT, *Chief Juſtice*, ſeemed not ſatisfied in, was, Whether when a rate is made for a quarter, they may diſtrain for it before the end of the quarter?

But ALL THE JURY ſaid, that the conſtant uſage was to do it, and that to avoid the miſchief that would enſue if the party ſhould remove out of the pariſh before the quarter.

(*a*) See the caſe of Rex *v.* St. Mary the Leſs, in Durham, 4. Term Rep. 477.

(*b*) The words of the 43. *Eliz.* c. 2. ſ. 1. are, that the overſeers, &c. ſhall "raiſe *weekly*, or otherwiſe, by taxation "of every inhabitant, &c. in the pariſh, "in ſuch competent ſum and ſums of "money as they ſhall think fit, a conve-"nient ſtock of flax, &c. to ſet the poor "on work, and alſo competent ſums of "money for and towards the neceſſary "relief of the poor, &c." But it ſeems that no preciſe period of time is fixed for which a poor-rate ought to be made. See Rex *v.* Littleport, ante 97. Rex *v.* Biſhopſgate, 8. Mod. 10. Stevens *v.* Evans, 2. Burr. Rep. 1152. 2. Black. Rep. 694. 1. Bott's P. L. 63, 64.

(*c*) But now by 17. *Geo.* 2. c. 38. ſ. 12. "Where any perſon or perſons ſhall come "into, or occupy any houſe, land, tene-"ment, or hereditament, or other pre-"miſes, out of, or from which any "other perſon aſſeſſed ſhall be removed, "or which at the time of making ſuch "rate was empty or unoccupied, that "then every perſon ſo removing from, "and every perſon ſo coming into, or "occupying the ſame, ſhall be liable to "pay ſuch rate in proportion to the time "that ſuch perſon occupied the ſame, "reſpectively in the ſame manner, and "under the like penalty of diſtreſs as if "ſuch perſon ſo removing had not re-"moved, or ſuch perſon ſo coming in or "occupying had been originally rated and "aſſeſſed in ſuch rate; which ſaid pro-"portions, in caſe of diſpute, ſhall be "aſcertained by two juſtices of the "peace."

To

* To which HOLT, *Chief Juſtice*, anſwered, That if he removed into another pariſh in the ſame county, they might diſtrain by a warrant from the juſtices, as well as in the ſame pariſh; but if he removed out of the county, he agreed that the remedy failed.

A *pariſh-rate* may be diſtrained for in a *different pariſh* in the *ſame county*.

So he gave way to the uſage in that point.

Dod *againſt* Monger. Caſe 307.

AN action on the caſe for reſcuing goods which the plaintiff had diſtrained for rent.

In an action on 2. *Will. & Mary*, c. 5. for reſcuing a diſtreſs, if the plaintiff ſtate that he was *ſeiſed in fee* of the premiſes, and demiſed them by parol "*for a year, and* "*ſo from year to* "*year*," he muſt prove the *ſeiſin in fee*; but he need not either ſtate or prove that he *gave warning*: if however it appear that the letting was "for a "year, and ſo "from year to "year *as long as* "*both parties* "*pleaſed*," this will not maintain *the demiſe* ſtated in the declaration.

The plaintiff declared, that he was ſeiſed in fee of a certain meſſuage, &c. that being ſo ſeiſed, he demiſed it to *J. S.* for a year, and ſo from year to year as long as both parties ſhould pleaſe, by a *parol-demiſe*, reſerving rent; that for rent-arrear he diſtrained; and that the diſtreſs was reſcued from him by the defendant; for which the action was brought.

The plaintiff having laid a *ſeiſin in fee* in himſelf, was fain to prove it.

And in proving the leaſe, it appeared to be for a year, and ſo from year to year as long as both parties pleaſed; and that the leſſee ſhould not go away without giving a quarter's warning.

EYRE and PARKER inſiſted, that the leaſe given in evidence varied from the leaſe declared on (*a*), ſo they failed in proving their declaration.

HOLT, *Chief Juſtice*. It is well enough; for the agreement concerning the quarter's warning is only a collateral agreement, not at all affecting the land in point of intereſt, but collaterally binding the perſon of the leſſee, and therefore it need not be mentioned in the declaration. In this caſe, if at the year's end the leſſee had given up the poſſeſſion without any warning, he would be liable to pay a quarter's rent by virtue of this agreement; but if he had given a quarter's warning, he might quit without more ado; but if he once entered upon the ſecond year, he would be bound for all that year, and to a quarter's warning, and ſo on. So it would be if ſuch a leaſe had been by deed: if a leaſe be for a year, and ſo from year to year, as long as both parties ſhall pleaſe, that is a leaſe binding but for one year; but if a leſſee, without countermand of the leſſor, enter upon the ſecond year, he is bound for that year, and ſo on; but if a leaſe be for a year, and ſo from year to year, until ſix years expire, that is a certain leaſe for ſix years: if it be for a year, and ſo from year to year, as long as both parties ſhall agree, until ſix years ſhall expire, that is a leaſe for ſix years, determinable at every year's end at the will of either party (*b*).

S. C. Holt, 416. Co. Lit. 47. 1. Roll. Abr. 673. Cro Eliz. 720. 1. And. 71. 1. Salk. 247. Lut. 213. Dougl. 279. 1. H. Bl. Rep. 312.

(*a*) See Hare v. Cator, Cowp. 766. (*b*) See 4. Term Rep. 680.

Diſtreſs when to be removed.
10. Mod. 265.
1. Ld. Ray. 54.
2. Ld. Ray. 1424.
Stra. 717. 851. 1040. 1272.
3. Com. Dig. "Diſtreſs," (D. 1.)

AND HE LIKEWISE HELD, that if a landlord come into a houſe, and ſeize upon ſome goods as a diſtreſs, in the name of all the goods in the houſe, that will be a good ſeizure of all.

But he muſt remove them in convenient time at common law; and now ſince the late ſtatute of 2. *Will. & Mary, ſeſſ.* 1. *c.* 5. immediately, except it be *hay* or *corn* (*a*); eſpecially here, for that the ſeizure was on *Monday*, though of *barrels of beer*, not eaſily removeable, if at all, without damage, and no removal until *Wedneſday*, when the defendant took them by virtue of a *replevin*, in which the * leſſee, not the diſtrainant, was made defendant.

* [216]

If a *diſtrainor* quit poſſeſſion, a re-taking of the goods is not a reſcous.

And beſides, the plaintiff quitted poſſeſſion of them the two intervening nights, and had not the poſſeſſion at the time of the taking by virtue of the *replevin*, without which there could be no *reſcous*.

The plaintiff was nonſuited.

How far a diſtrainor may be a treſpaſſer.
1. Roll. Abr. 673. 8. Co. 146. 1. Leon. 220. Cro. Eliz. 783. Cro. Jac. 148. 1. Vent. 77. Owen, 46.

In this caſe it appeared alſo, that the diſtrainant drew beer out of one of the barrels; which, PER HOLT, *Chief Juſtice*, made him a treſpaſſer *ab initio* (*b*) as to that barrel only.

(*a*) See 11. *Geo.* 2. c. 19.

(*b*) But by 11. *Geo.* 2. c. 19. ſ. 20. Diſtreſſes for rent ſhall not be deemed unlawful for any irregularity or unlawful act afterwards done by the party diſtraining, nor the party deemed a treſpaſſer *ab initio*; but the parties grieved thereby may recover ſatisfaction for the ſpecial damage, and no more, on an action of *treſpaſs* or *on the caſe*, &c.

Caſe 308.

Rich *againſt* Aldred.

If *A.* bail the goods of *C.* to *B.* and *C.* bring *detinue* againſt *B.* he may plead *the bailment*, and pray *garniſhment*.
1. Salk. 223.
1. Roll. Abr. 734.

DETINUE for *Oliver Cromwell* the Protector's picture.—PER HOLT, *Chief Juſtice*, at the trial. If *A.* bail the goods of *C.* to *B.* and *C.* bring *detinue* againſt *B.* for them, *B.* may plead *the bailment* to him by *A.* to be re-delivered to *A.* and ſo bring in *A.* as *garniſhee*, to interplead with *C.* And if *A.* bail goods to *C.* and after give his whole right in them to *B.* *B.* cannot maintain *detinue* for them againſt *C.* becauſe the *ſpecial property* that *C.* acquires by *the bailment*, is not thereby transferred to *B.* (*a*).

(*a*) See Year-Book 6. *Hen.* 7. pl. 9. a. Brook Abr. "Detinue," pl. 19.

Caſe 309.

Johnſon and his Wife *againſt* Browning.

In an action for malicious indictment, if the indictment be recited "according to the *ſubſtance following*," a variance of "*valoris*" inſtead of "*ve-*" "*lentiæ*" is immaterial; but if the recital had been "*in hæc verba*," the variance would be fatal.
S. C. Holt, 3. Ante, 25. Poſt. 261. 1. Salk. 14, 15. 5. Mod. 349. 405. 8. Mod. 227. 307. 10. Mod. 145. 148. 209. 214. 11. Mod. 180. 12. Mod. 208. 273. 555. Fitzg. 43. 98. 173. 1. Ld. Ray. 81, 378. 503. Stra. 114. 691. Cowper, 229. See Eſpinaſſ. Dig. 532. 4. Term Rep. 590.

ACTION on the caſe for maliciouſly indicting and proſecuting the wife for felony, whereof ſhe was acquitted.

The

JOHNSON AND HIS WIFE *against* BROWNING.

The declaration recited the indictment, *continent' materiam sequentem*; and in the recital of the goods supposed to be stole, it was *valoris* of so much; whereas the indictment was *valentiæ* of so much.

It was objected, that this was *a variance* from the indictment.

But it was over-ruled; for that was the same in substance, and so *materiam sequentem*; but if they had undertaken to set forth the indictment *in hæc verba*, it would have been a fatal exception (*a*).

In what manner a malicious prosecution may be proved.

NOTA, by HOLT, *Chief Justice*. To do the business fully, the plaintiff ought to have proved a copy of the bill exhibited (*b*), and that it was found upon the oath or procurement of the defendant; but their names upon the back of the bill is sufficient evidence of their being sworn to the bill (*c*), though the writing upon the back be no part of the record: but it may be proved, that the defendant was a witness without having the bill; but it were, I say, more clear to have the bill.

An action for a malicious prosecution will not lie, if there were *probable cause* for it.—10. Mod. 217. Bull. N. P. 14. Ld. Ray. 190. 729. 738. 752. 1. Stra. 79.

And the first part of the defendant's defence in this case must be to prove a *felony committed*; for without that it is impossible he could have a *probable cause* of prosecution (*d*).

In an action for a malicious prosecution for felony, the oath of the defendant, made at the trial of the indictment, admitted to prove the felony committed. Bull. N. P. 15.

And here, because nobody was by at the time of the supposed felony committed, but the defendant's wife, who could not in this case be a witness to prove the felony committed,

HOLT, *Chief Justice*, allowed her oath, which she made at the trial of the indictment, to be given in evidence to prove a felony committed; for otherwise one that should * be robbed, &c. would be under an intolerable mischief; for if he prosecuted for such robbery, &c. and the party should at any rate be acquitted, the prosecutor would be liable to an action for a malicious prosecution without a possibility of making a good defence, though the cause of prosecution were ever so pregnant.

* [217]

(*a*) Rex *v.* Beach, Cowp. 229. Dougl. 194. notis. Dougl. 97. Rex *v.* May, Dougl. 193.

(*b*) See Morrison *v.* Kelley, 1. Black. Rep. 383.; that a copy of the indictment must be produced when the indictment was for *felony*, but when it was for a misdemeanour only, a copy is not necessary. See Jordan *v.* Lewis, 1. Stra. 1122. and 3. Black. Com. 126.

(*c*) See Girlington *v.* Pitfield, 1. Vent. 47.

(*d*) To support this species of action, it must appear that there was *malice* in the defendant, and a want of *probable cause* for the prosecution, Bull. N. P. 14. but the absence of *probable cause* shall be taken as strong evidence of malice, Reynolds *v.* Kennedy, 1. Wils. 232. Johnston *v.* Sutton, 1 Term Rep. 493. 544.; and what shall be deemed *probable cause* is matter of fact for the opinion of the jury, Bull. N. P. 14. But although *express malice* be proved, yet unless there also appear want of *probable cause*, the defendant cannot be convicted, Bull. N. 14. and therefore it is a good defence to shew fair and reasonable grounds for *suspecting the guilt* of the plaintiff, Knight *v.* Germain, Cro. Eliz. 134.; Pain *v.* Rochester, Cro. Eliz. 871. although, in point of fact, no *felony* was actually committed, Samuel *v.* Payne, Dougl. 359.; Ledwick *v.* Catchpole, Cald. Cases, 291.

JOHNSON AND HIS WIFE *againſt* BROWNING.

DARNELL, *for the plaintiff*, ſaid, that if oath had been made freſhly after the fact committed, that oath might be admitted as evidence of it; otherwiſe not; but that here it appeared a warrant was taken out immediately, but nothing done thereupon until the defendant had a ſubſequent falling out with the plaintiff.

HOLT, *Chief Juſtice*, ſaid, that the fact of *Pigot's Caſe* (*a*) was this: A *ſon-in-law* indicted his *ſtep-mother* for poiſoning her huſband, his father; that ſhe, being acquitted, brought an action for malicious proſecution againſt him, and recovered damages againſt him; that he, to requite her kindneſs, brought an appeal of murder; and that ſhe was thereupon tried, and convicted at the king's bench bar, and carried down, and burnt in *Berkſhire*, where the fact was committed. And he remembered another very lately, where a fellow brought an action for ſaying of him, "*he is a highway-man*;" and it appearing upon evidence that he was ſo, he was taken in court; committed to NEWGATE; convicted at the next ſeſſions; and hanged. So that people ought to adviſe well before they bring ſuch actions.

And DARNELL remembered the like fate which befel a client of his.

(*a*) Cro. Car. 383.

Caſe 310.

Buſhell *againſt* Paſmore.

In debt on bond, if the defendant plead that it was delivered as an *eſcrow* upon a condition not performed, and ſo *not his deed*, a concluſion *to the country*, is cured by replying a different *condition*, and traverſing the condition ſtated in the plea.

DEBT upon a bond: the defendant pleads, that the bond was delivered as *an eſcrow* to a third perſon, to be his deed to the plaintiff upon his vacating a certain judgment, which was not done, and ſo "*non eſt factum*;" *et de hoc ponit ſe ſuper patriam* (*a*), without adding, *et præd'* the plaintiff *ſimiliter*.

The plaintiff replies, that it was delivered as *an eſcrow*, to be delivered to him upon his payment of twenty ſhillings towards vacating the judgment.

And iſſue was taken thereupon; that is, upon A TRAVERSE *of* its being delivered as *an eſcrow*, to become his deed upon vacating the judgment.

On evidence, it was ſworn to have been delivered as *an eſcrow* to become the defendant's deed upon the plaintiff's vacating the judgment.

S. C. Holt, 213. Plowd. 66. Hob. 246. Cro. Eliz. 808. 2. Wils. 341. 347. 3. Keb. 142. Savil, 71. 1. Salk 274. 7. Mod. 53. Ld. Ray. 354.

In what caſes a written obligation delivered as an *eſcrow*, ſhall become *a deed*.

HOLT, *Chief Juſtice*, held, that there is no difference between delivering a deed as *an eſcrow*, to become the party's deed upon —2. Roll. Abr. 683. Ray. 197.

(*a*) See the caſe of Watts v. Roſewell, v. Blantern, 2. Wils. 341. 347. 3. Salk. 274. 7. Mod. 53. 105. Collins

his

his doing ſuch a thing, and to be delivered to the party as his deed upon his do ng ſuch a thing, for in neither caſe it is his deed until the ſecond delivery: and he ſaid, if a man deliver a writing as his deed to a ſtranger, to be delivered by him to a third perſon upon his doing ſuch a thing, that is a deed *ab initio* in truſt for * the third perſon upon a contingency: but upon the ſaying in *Periman's Caſe* (*a*), he was content to have the matter found ſpecially. BUSHELL *againſt* PALMER. * [218]

But the plaintiff was nonſuited upon another point.

And HOLT, *Chief Juſtice*, ſaid, that in all his time he never knew ſuch A PLEA as this; for all theſe ſpecial *non eſt factums*, in caſe of *eſcrow* and *raſure*, &c. are impertinent, for thereby the defendant brings all the proof upon himſelf; whereas if he had pleaded "*non eſt factum*" generally, he would have turned the proof of whatever is neceſſary to make it his deed upon the plaintiff. Special *non eſt factums* bring all the proof upon the defendant. Savil. 71. 1. Salk. 274. 5. Com. Dig. "Pleader" (2. W. 18.)

And IT WAS AGREED BY ALL, that the deed cannot be *an eſcrow* to the party himſelf.

(*a*) Qu. 5. Co. 84. b.

MICHAELMAS TERM,

The Third of Queen Anne,

IN

The Queen's Bench.

Sir John Holt, *Knt. Chief Juſtice.*

Sir John Powell, *Knt.*
Sir Lyttleton Powys, *Knt.* } *Juſtices.*
Sir Henry Gould, *Knt.*

Edward Northey, *Eſq. Attorney General.*
Simon Harcourt, *Eſq. Solicitor General.*

* Culliford's Caſe. Caſe 311.

CULLIFORD was acquitted upon an indictment of *murder* in the country; and, on an appeal brought, time was given by the Judge of aſſize until the next aſſize to plead. In the interim the appellant brings a *habeas corpus* and *certiorari* to remove the record and body of the appellee up hither; and at a Judge's chamber the parties agreed; ſo that the appellee was let go upon bail. The agreement being now perfected, and *a releaſe* given by the appellant, and the appellee appearing upon his recognizance,

If an *appeal* of murder be removed by *habeas corpus* and *certiorari* into the king's bench, and the *appellee* be admitted to bail, he cannot be diſcharged on appearing to his recognizance, and *producing* a releaſe from the proſecutor; but muſt be arraigned upon THE RECORD, and then plead *the releaſe*, or *autrefois acquit.*

EYRE moved to have him diſcharged, on producing the releaſe, and a counſel appearing for the appellant to conſent to it.

But PER CURIAM, The *certiorari* and *habeas corpus* muſt be returned here. When we are thus poſſeſſed of the record, he muſt be arraigned upon it, and then he may plead his releaſe; or if, at the return thereof, the appellant be not ready to arraign him, and do not appear, he ſhall have a *ſcire facias* to bring him to do it; and if he do not come at the return thereof, he ſhall be nonſuited. And

S. C. 1. Salk. 382. S. C. 3. Salk. 89. Ld. Ray. 434. 556. 1287. Stra. 855. 858. 11. Mod. 216. 228. 12. Mod. 20. 109. 157. 349. 374. 642. 1. Salk. 61. Carth. 16. 331. 395. Skin. 48. 443. 553. 634. 670. 2. Hawk. ch. 28. ſect. 4. ch. 23. ſect. 124. ch. 35. ſect. 2. Stanf. 70. Kely. 91. Stra. 854. 5. Burr. 2645. 2648. 1. Com. Dig. "Appeal" (G. 5.).

CULLIFORD'S CASE.

the appellee is not thereby discharged; for here being a record against him, he shall thereupon be arraigned at the suit of THE QUEEN, and then he may plead *auterfoits acquit*: for there being a record against him, that record must be discharged. And it was compared to the case where two indictments are against a person for one fact, as one by THE CORONER'S INQUEST, and the other by THE GRAND JURY, and he is arraigned, tried, and acquitted upon one of them, * yet he is not thereby discharged, but shall be arraigned *de novo* upon the other, to which he may plead the former acquittal on the other. But now the course is in THE OLD BAILEY, and is indeed the most easy and fair, to try him upon both the indictments at once.

* [220]

Case 312. The Queen *against* Weekes.

Return of a *rescous* quashed for repugnancy. 2. Salk. 586. Ante, 141. 2. Hawk. ch. 21. s. 4.

THE SHERIFF returned a rescous thus: "*Non est inventus* "*in ballivâ meâ*," and "*executio residui istius brevis patet in* "*schedulâ huic brevi annex.*" and that was of a taking and rescous.

And the return of the rescous was quashed for the repugnancy. For PER CURIAM, After *non est inventus* all the rest is idle, and there remains no more for the sheriff to do.

BUT NOTE, upon the return of "rescous" the sheriff always concludes, that after the rescous made the defendant *non est inventus in ballivâ, &c.*

Case 313. * The Queen *against* Elizabeth Franklin.

When a statute gives a penalty to *the king* and to *the informer*, and the informer does not sue within *the year*, the King may sue for the whole penalty at any time within *two years*. S. C. 1. Salk. 370. 377. S. C. 3. Salk. 351. S. C. 1. Ld. Ray. 1038. 1. Salk. 373. Ante, 128. 1. Show. 354. Savil, 6. 4. Mod. 145, 146. 5. Mod. 425. Carth. 163.

ELIZABETH FRANKLIN was indicted at the quarter sessions of a borough for exercising the trade of a goldsmith, not having served seven years apprenticeship to it.

EYRE moved to quash it; for it appeared that it was a year after the offence committed.

But PER CURIAM, Upon a view of the statute 5. *Eliz.* c. 4. where a moiety of the penalty goes to the informer, a prosecution upon that statute must be within a year by the informer; but where it is purely at suit of the queen she has two years; and where the penalty is distributed, a moiety to the queen and a moiety to the informer, and no prosecution within the year, the queen has another year, and shall have all the forfeiture.

An indictment on 5. *Eliz.* c. 4. will lie at a *borough sessions*. 6. Co. 19. Cro. Car. 316. Cro. Eliz. 737. 6. Com. Dig. "Trade" (D. 7.). and see Farren *qui tam* Williams, Cowp. 369.

A SECOND EXCEPTION was, that the quarter sessions of boroughs ought not to receive such indictments, but only those of the county at large: and for this he quoted the case of *The King v. Taylor*,

and

and another caſe in the thirteenth year of *William the Third*, where the indictment was quaſhed upon that exception. THE QUEEN *againſt* ELIZABETH FRANKLIN.

But PER CURIAM, The contrary has been ſettled on debate ſince, and there is no danger of oppreſſion, becauſe a *certiorari* lies.

A THIRD EXCEPTION was to the caption, and was this: "*Jura-* "*tores, &c. ſuper ſacramentum ſuum præſentant exiſtit.*" And this being nonſenſe, the indictment was quaſhed for it. A caption "*ju-* "*ratores ſuper* "*ſacramentum* "*ſuum, &c.*" is bad.—1. Salk. 370. and 371.

Anonymous. Caſe 314.

PER CURIAM. When one removes an indictment by *certiorari*, the defendant ought to appear above the Term it comes in, or elſe he forfeits the recognizance which he enters into for the trying of it; but ſuch appearance need not be in perſon, but by his clerk, and without it he cannot have a copy of the indictment to quaſh it. A defendant who removes an indictment by *certiorari* muſt appear during the Term in which the writ is returned.

Ante, 42. 114. 1. Salk. 270. 380.

* Anonymous. Caſe 315.

NOTE LIKEWISE, One cannot move to quaſh an indictment for a fault in the caption the ſame Term it comes in.

Anonymous. Caſe 316.

PER CURIAM. After writ of error brought, if the record be not certified at the return of it, upon certificate thereof from the officer of the court in which the writ of error is returnable, the other may have a writ *de executione judicii* of courſe, and the party cannot hinder execution without a new writ of error. If the record be not certified on the return of a writ of error, the party may take out *execution*.

1. Salk. 265. Stra. 886. 5. Com. Dig. "Pleader" (3. B. 12.).

Boiſloe *againſt* Baily. Caſe 317.

TRESPASS FOR ASSAULT, BATTERY, AND WOUNDING. The defendant, as to the *vi et armis*, pleads *not guilty*, and as to the reſidue of the treſpaſs pleads a ſubmiſſion to an award of all controverſies, and ſets forth *an award* made, *viz.* that the defendant ſhould provide two fowls at his manſion-houſe in *Old-Bedlam* in *London*, to be eat by the plaintiff and his friends on *Wedneſday* or *Thurſday* in ſuch a week, *in ſatisfaction* of the ſaid treſpaſs; and avers, that on *Thurſday* in the ſaid week he did provide two fowls at his manſion-houſe aforeſaid, &c. but that the plaintiff nor his friends did not come. The defendant may plead the award of a *collateral thing in ſatisfaction*, without averring that the award is performed.

S.C. 1 Salk. 76. S. C. Holt, 711. T. Jones, 65. 158. Carth. 159. 188. Skin. 679. 1. Salk. 76. Kyd, 94.

To this it was replied, that *Wedneſday* was the day appointed for the fowls, and a traverſe that it was *Wedneſday* or *Thurſday*.

To this there was a rejoinder and demurrer.

IT

Boisloz *againſt* Baily.

IT WAS URGED, that the bare award in this caſe was not a good bar without an execution of it, becauſe it was of a collateral thing, of which the plaintiff could not have an action: and for this was quoted *Keilw.* 121. for an accord without a ſatisfactory conſideration cannot be good; and if we have no remedy for what is awarded, it is in the power of the defendant whether he will ſatisfy us or not. An accord, and tender and refuſal, is not a good bar *(a)*; and the reaſon is, becauſe an action would not lie upon the accord for the plaintiff *(b)*.

TO THE FIRST EXCEPTION it was anſwered by HALL, *Serjeant*, that indeed the old books did hold, that an award of a collateral matter in ſatisfaction of damages, was not a good plea in bar without alledging performance; becauſe, as was then held, no remedy lay upon the award: but that reaſon fails; for though it be true that no remedy lies upon the award itſelf for it, yet an *aſſumpſit* lies upon the ſubmiſſion, which is a promiſe of performance.

And to that opinion HOLT, *Chief Juſtice*, did very ſtrongly incline; for he ſaid, it had been often held of late days, that the ſubmiſſion mutual was an actual mutual promiſe of performance *(c)*; and if this had been upon a bond awarding a collateral matter, it had been a good award, becauſe the party has remedy upon the bond of ſubmiſſion; and if there be remedy for the thing awarded, it need not be averred executed.

A ſubmiſſion of treſpaſs need not notice the *vi et armis*.

A SECOND EXCEPTION was, that the treſpaſs declared on was *quare vi et armis, &c.* and there was no conſideration or ſubmiſſion of the *vi et armis*, and ſo this award could not be a bar to the declaration.

HALL, *Serjeant*, *contra*. As to the not ſubmitting the *vi et armis*, it concerns the queen, and cannot be ſubmitted by the parties.

On an award that *A.* ſhall give *B.* a dinner on *Wedneſday* or *Thurſday*, notice is neceſſary.

A THIRD EXCEPTION, that it being at the election of the defendant to provide the fowls on *Wedneſday* or *Thurſday*, he ought to give the plaintiff notice on which of the days he would provide them, and the time of the day on which he would have them ready; for otherwiſe, if the plaintiff come on *Wedneſday* to his houſe with his friends, the defendant might ſay he ſhould not provide the fowls until next day, and if the plaintiff did not come on *Wedneſday* the defendant might ſay he provided them the day before.

HALL, *Serjeant*, anſwered, that the giving of notice was not neceſſary; for the defendant by the award had the advantage of an election given him.

(*a*) See the Year-Books 9. *Edw.* 19. *e.* 17. *Edw.* 4. pl. 8. 9. Co. 79.

(*b*) See the Year Book 16. *Edw.* 4. pl 8, 9. 1. Roll. Abr. 128. Stiles, 245.

(*c*) See 1. Ld. Ray. 122. 2. Ld. Ray. 1039. Kyd on Awards, 7.

A FOURTH

A FOURTH EXCEPTION was, that in this caſe it was not enough to ſay, that he had provided the fowls, but that he ſhould have tendered them; for the words of the award are, "*provide* and *give*, &c." In pleading an award of a collateral thing; qu. if *a tender* ſhould be ſtated.

HALL, *Serjeant.* This objection, *viz.* the want of pleading a tender, falls to the ground, if the anſwer to the firſt objection be good.

A FIFTH EXCEPTION * was, that there is no *venue* laid where the fowls were provided, it is only laid to be at the defendant's houſe in *Old Bedlam*, in *London*; and in *London* the *venue* ought to be laid in *the ward*, which is like a hundred; or in a pariſh at leaſt, which is in the nature of a vill in another county. In pleading an award of a collateral thing in ſatisfaction; qu. if *the place* of performance ought not to be ſtated.

HALL, *Serjeant*, as to this objection anſwered, that the not laying a *venue* was helped by verdict.

To which HOLT, *Chief Juſtice*, ſaid, that the want of a *venue* is only curable by ſuch plea as admits the fact for the which it was neceſſary to lay *a venue*; as if debt be upon a bond, and no *venue* laid where the bond was made, on demurrer to it, it will be ill; but if the defendant plead *a releaſe* whereby the bond is admitted, that helps the declaration.

But in this caſe, by reaſon of the frivolouſneſs of the action, THE COURT gave no judgment, but wiſhed them to compromiſe the matter.

Anonymous. Caſe 318.

PER CURIAM. If one pretending to have title to land give ſecurity to the tenants to ſave them harmleſs upon paying him the rent, and afterwards another recover in ejectment againſt them, they have no remedy upon the ſecurity until recovery of the mean profits, which is from the time of the action brought, and without an actual entry there can be no recovery of the profits. If ſecurity be given to tenants on paying their rent, and they are afterwards ouſted, they have no remedy until the mean profits are recovered.

Anonymous. Caſe 319.

PER CURIAM. If a man ſign a leaſe in one county or vill of lands in another, yet the jury muſt come from the place where the land lies in an ejectment upon ſuch leaſe. The *venue* in ejectment muſt be where the land lies.

Ante, 130. Poſt. 309. 1. Salk. 273. 2. Salk. 645.

Anonymous. Caſe 320.

PER CURIAM. A new trial is never granted for want of evidence whereof the party was appriſed, and which he might have had at the trial. New trial. Ante, 22. Poſt. 242.

Anonymous.

Caſe 321. * Anonymous.

If only part of the debt be levied on a *fi. fa.* the plaintiff may have a *ca. ſa.* for the reſidue.

PER CURIAM. If one levy part of his debt by *fieri facias*, he cannot after take out a *capias* for the whole; but his way is, to return the *fieri facias*, by which it may appear how much is levied, and then take a *capias ad ſatisfaciendum* for the reſidue (*a*).

(*a*) See the caſe of Walter v. Dennis, Cro. Eliz. 344. 1. Roll. Abr. 904. 3. Bl. Com. 417.

Caſe 322. Anonymous.

Tithe fiſh. Cro. Car. 339. 1. Lev. 179. 1. Sid 278.

PER CURIAM. FIRST, No tithe is due for *fiſh* of common right, but it may be by cuſtom (*a*).

1. Vent. 5. 5. Bac. Abr. 63. 3. Com. Dig. "Diſmes."

Wood is titheable by cuſtom.

SECONDLY, No *wood* is titheable of common right, but only by cuſtom (*b*).

Carth. 303. 379. Skin. 51. 239. 341. 356. 560. 1. Keb. 454. 2. Keb. 2. 447.

(*a*) See Rex v. Carlyon, 3. Term Rep. 385.

(*b*) See Doctor and Student, dial. 2. c. 55. 13. Co. 13.

Caſe 323. Anonymous.

After a *nonſuit* in *replevin*, it is too late to object that the avowry ſtates a *particular eſtate*, without ſhewing its *commencement* or a ſeiſin *in fee*. Ante, 158. 5. Mod. 150.

IN REPLEVIN the avowant ſaid, that he was poſſeſſed for years, and made an under-leaſe, reſerving rent, &c. for which arrear he diſtrained. The plaintiff was nonſuited, and a return irrepleviſable awarded.

The exception taken upon the return of the writ of enquiry was, that the avowry was naught, for that the avowant pleaded a *particular eſtate*, without ſhewing who had *the fee*, and the commencement of the particular eſtate.

But though that were bad, yet being after the nonſuit it was too late; for the interlocutory judgment is ſuch on which a writ of error lies, as in judgment on a writ of dower.

Caſe 324. Stanyon *againſt* Davis.

Error of judgment in the marſhal's court, &c. Poſt. 227. See Danv. Abr. tit. "Error," poſt. 303. S. C. 1. Salk. 404. S. C. 11. Mod. 7. S. C. Holt, 13. S. C. 2. Ld. Ray. 795.

ERROR OF A JUDGMENT in *the Maraſhalſea Court*, wherein the plaintiff declared, that at ſuch a day, in ſuch a pariſh, in the county of *Middleſex*, he delivered into the ſtable of the defendant thus, "*præd.* DAVIS *com. hoſpitat. adtunc et ibidem exiſten. in ſtabulum* "*deliberavit*" a certain gelding, to be by him ſafely kept at a reaſonable rate, and to be ſafely re-delivered by him to the plaintiff; that the defendant *adtunc ibidem tam negligenter* the ſaid gelding did keep, that through his defect it was taken out of his inn, and ſo immoderately rid and whipped that he was quite ſpoiled. Verdict and damages for the plaintiff, and judgment for him below.

RAYMOND

RAYMOND and CHESHIRE, upon a writ of error being brought, at ſeveral times, excepted:

STANYON *againſt* DAVIS.

FIRST, That the horſe, for aught that appears, was put into the defendant's ſtable without his privity, and if ſo he was not bound to take any care of it; for as the declaration is worded, it is to be underſtood that it was delivered into his ſtable, he being a common innkeeper; for *præd. D. com. hoſpitator. exiſten.* muſt be taken in the ablative caſe.

Words indifferent ſhall be taken in that ſenſe which makes the declaration good.

But the words being indifferent to an ablative or dative, and taking them in a dative making the declaration good, and the other bad; *per* POWELL, POWYS, and GOULD, *Juſtices*, *abſente* HOLT, *Chief Juſtice*, it ſhall be taken in that which makes it good.

* [224]

SECONDLY, That no place was laid where the immoderate riding was, nor that it was *within the juriſdiction* of the inferior court: and it was laid down for a rule, and agreed to by THE COURT, that whatever is eſſentially neceſſary to maintain an action, if the action be brought in *an inferior court*, that matter muſt be averred to have been *within their juriſdiction*, otherwiſe they have no* juriſdiction; for whatever is not averred to be *within their juriſdiction*, ſhall be intended out of it.

In an action on the caſe in an *inferior court* for negligently keeping the plaintiff's horſe, whereby he was taken out of the defendant's ſtable and immoderately rode, it is not neceſſary to aver that the *immoderate riding* was *within the juriſdiction*; for the breach of *the contract* is the *gift* of the action. S. C. Salk. 404. Ante, 3. Poſt. 306. 1. Saund. 74. 1. Vent. 243. 1. Sid. 87. 1. Lev. 137. 2. Jones, 230. 2. Lev. 87. 3. Com. Dig. "Courts" (P. 9.),

IT WAS ALSO AGREED clearly, that if that which is the *gift* of the action, and the complete cauſe of it, be laid within the juriſdiction, and the declaration ſhews further matter, which is only aggravation or conſequential damage without which the action would have lain, ſuch matter need not be averred to be *within the juriſdiction*; as in an action on the caſe for calling a woman *a whore*, whereby ſhe loſt a marriage, there not only the words, but alſo the loſs of marriage, muſt be alledged to be within the juriſdiction, becauſe the one without the other will not maintain the action; and there one may confeſs the words and traverſe the damage (*a*). So in treſpaſs by a maſter for the battery of his ſervant, whereby he loſt his ſervice; the loſs of ſervice, as well as the battery, muſt be laid within the juriſdiction (*b*). But in an action by a tradeſman for calling him *a cheat* in his trade, whereby he loſt his cuſtomers; there the loſs of cuſtomers need not be alledged within the juriſdiction, becauſe the words are actionable without it, and it is only aggravation (*c*). In an action for arreſting one in another man's name, without conſent of the other, *per quod* his creditors came all and arreſted him, it is not needful to alledge that the creditors came upon him *within the juriſdiction*, becauſe the arreſting in another's name, without the other's conſent, is in itſelf actionable (*d*).

(*a*) 1. Sid. 85. 95. Ray. 63. 1. Lev. 69. 153.

(*b*) So a declaration in an *aſſumpſit* in an inferior court for money had and received, muſt not only alledge that the defendant *promiſed to pay* within the juriſdiction, but that the money was had and received within the juriſdiction, Trevor *v.* Wall, 1. Term Rep. 151.—See alſo Waldock *v.* Cooper, 2. Wilſ. 16. Fitzg. 44. 9. Mod. 77. Stra. 827. Ld. Ray. 1555.

(*c*) 1. Roll. Abr. 546. 1. Cro. 570.

(*d*) 1. Jones, 448.

THIRDLY,

If a perſon deliver his horſe to a *ſtable-keeper*, to be by him *ſafely kept*, at a reaſonable rate, and to be ſafely re-delivered, and the horſe, by the negligence of the ſtable-keeper, be taken out of the ſtable, and ſo immoderately rode as to be ſpoiled, an action lies for his neglect in not ſafely keeping the horſe, according to the contract.

THIRDLY, The doubt was, Whether the defendant's neglect, in ſuffering the gelding to go out of his cuſtody, was a complete cauſe of action, without any regard to the riding, &c.

WARD urged, that the ſole cauſe of action was the not keeping the gelding ſafely, according to the contract; and for this he quoted *the Regiſter*, 106. and *Raſt. Ent.* 3. and then it being a nonfeaſance, no *venue* need be where the nonfeaſance was (*a*).

And in *Eaſter Term* laſt, upon the arguing of this caſe, HOLT, *Chief Juſtice*, aſked the Counſel for the plaintiff in error, whether, if the original declaration had been in this court, they would venture to demur to it for not ſhewing the place the horſe was immoderately rid in? And he ſaid, ſure they would not. And then if this were a good declaration in a ſuperior court without that, it will not be neceſſary to aver it within the juriſdiction of an inferior court in an action brought there.

CHESHIRE anſwered, that the inference did not follow; for if *indebitatus aſſumpſit* be in a ſuperior court for goods ſold and delivered, though no place be laid where the ſale or delivery was, yet it is no cauſe of demurrer, but the not alledging it to be within the juriſdiction of an inferior court would be fatal (*b*).

But PER TOTAM CURIAM, The judgment was affirmed; for the neglect of not keeping according to the contract is the ſole *gift* of the action; for if the declaration had been, that the defendant did ſo negligently keep the horſe that he was taken out of his ſtable, and rid into * *Somerſetſhire*, to his damage, &c. the action would lie: or that he ſo negligently kept him, that through his neglect he was beat or abuſed, or wanted reaſonable provender in his inn. And the ſole cauſe of action is his neglect of due care of him.

* [225]

The judgment was affirmed.

(*a*) See 1. And. 139. and the caſe of Walker *v.* Aſhwood, Michaelmas Term 10. *Will.* 3. in the king's bench.

(*b*) See the caſe of Paſton *v.* Ledham, Year-Book Mich. Term, 37. *Hen.* 6. page 2. b. pl. 4.

Caſe 325.

Anonymous.

How a ſpecial verdict finding an *original deed* ſhall conclude, where *the counterpart* was in evidence.

NOTE, The Chief Juſtice remembered the caſe of *Mayo v. Combe* (*a*), in my LORD HALE's time, where the counterpart of an ancient deed was admitted in evidence; and a ſpecial verdict being found in the caſe, finding the original deed, it concluded "*prout* "by the counterpart it did appear." And this was ſo done to preſerve the precedent.

In what caſes the counterpart of a deed is good evidence. Pott. 248. Carth. 79, 80 142. 181. 220. 225. 265. 346. Skin. 15. 24. 82. 174. 205. 431. 579. 584. 623, 624. 639, 640. 672, 673. 1. Mod. 4. 94. 114. 5. Mod. 211. 386. 4. Com. Dig. "Evidence" (B. 4.).

And now ALL THE COURT held, that the counterpart of an ancient deed which might be loſt was good evidence with other circumſtances, but not of itſelf without other circumſtances; but that a counterpart of a deed leading the uſes of a fine was of itſelf good evidence.

(*a*) Hard. 119. 1. Lev. 25. 3. Keb. 477.

Fox

Fox *againſt* Tilly. Caſe 326.

DEBT UPON A BOND conditioned to ſave the plaintiff harmleſs againſt all eſcapes which he *had* ſuffered as WARDEN OF THE FLEET PRISON.

A bond given to ſave a gaoler harmleſs againſt *paſt eſcapes* is good, but not againſt *future eſcapes*.

And on demurrer to the rejoinder, which was in itſelf a departure from the plea, which was a *non fuit damnificatus*, and a ſpecial damage replied, and continuance given to the firſt day of this Term,

2. Salk. 438. 653. 5. Com. Dig. "Pleader" (2. W. 25.).

THE COURT took a diverſity between a bond to ſave harmleſs againſt *future eſcapes*, for that would be void, and a bond to ſave harmleſs againſt *paſt eſcapes*; for though it were unlawful to ſuffer them, yet one may contract to indemnify one againſt a penalty already incurred againſt law.

AND NOTE, Here the Court was informed that the plaintiff was dead, and therefore they ought not to go to judgment.

If a plaintiff die between the day of *niſi prius* and day *in bank*, the fact muſt be pleaded *puis darrein continuance*. Inſt. Leg. 604.

To which they anſwered, that if that were ſo, the defendant muſt come and plead it as a plea *puis darrein continuance*, and make *oath* of the truth of it, otherwiſe they would not take notice of it; and if the plaintiff were alive on the *continuance-day*, they might well give judgment.

And accordingly the plaintiff had judgment. For, PER CURIAM, if he die before the *firſt day of Term*, we cannot take notice of it without it be pleaded as *puis darrein continuance*; and if he were alive the *firſt day of Term*, the judgment ſhall relate to that day.

Linch *againſt* Hooke. Caſe 327.

PER CURIAM. If *A.* give bond by name of *B.* and he is ſued by name of *B.* he may plead *miſnomer*, and the other muſt plead that he made the bond by the name of *B.* and eſtop him by demanding judgment whether againſt his deed he ought to be admitted to ſay his name is *A.*; and then the defendant may rejoin, and ſay, that he made no ſuch deed: and this the defendant muſt do without *oyer*; for if he pray *oyer*, he admits his name to be *B.*

If *A.* make a bond in the name of *B.* and is ſued by the name of *B.* he may plead *miſnomer*. S. C. poſt. 311. S. C. 1. Salk. 7. Ante, 28.

* [226]

* Anonymous. Caſe 328.

IF A WRIT be returnable in one Term, the defendant ought to put in bail in that Term, that is, at any time before the *eſſoin-day* of the next Term, and until then it is irregular to proceed upon the bail-bond; but one in the mean time may take an aſſignment upon it, and take out a warrant.

It is irregular to proceed on bail-bond until the eſſoin-day of the next Term. Stra. 399.

Andr. 374. 1. Com. Dig. "Bail" (Q. 1.).—See 4. & 5. *Anne*, c. 16.

Caſe 329.

Adams *againſt* Terre-tenants of Savage.

If an adminiſtrator bring a *ſcire facias* on a judgment by his inteſtate, to warn the tenants, and the ſheriff returns ſeveral *terre-tenants*, they cannot all appear and plead in *abatement* jointly.

THE CASE being moved again this Term, it appeared on the record to be thus:

A *ſcire facias* was brought by an adminiſtrator upon a judgment by his inteſtate, to warn in the tenants of ſuch lands as were *Savage's* at the time of the judgment, &c. The ſheriff returns ſeveral *terre-tenants*; among others *J.* and *S.* his wife, tenants of a capital meſſuage called *B.* and alſo of the manor of *B.* All the tenants appear, and plead *in abatement* jointly, *viz.* that one *G. T.* is tenant of the freehold of the manor of *B.*; and ſo pray judgment of the writ, *et quod caſſetur.*

1. Keb. 351. 388. 2. Keb. 55. 728. 3. Keb. 25. 50. 3. Lev. 205.

PER CURIAM. The plea is clearly bad.

FIRST, Becauſe they all join in the plea, when they are returned ſeveral *terre-tenants*; for if *A.* be returned *terre-tenant* of one parcel, and *B.* of another, *A.* cannot plead that another is *terre-tenant* of another parcel, and not returned, except only as far as it affects himſelf, but not *quatenus* it affects *B.*

If on a *ſcire facias* againſt *terre-tenants* the ſheriff return, among others, *John* and *Sarah* his wife as tenants, a plea in abatement that *G. T.* is the tenant is bad; for it is pleading *non-tenure* by implication.

S. C. ante, 134. 199.

SECONDLY, This, as the record is, is pleading a *non-tenure* by implication; for if *G. T.* be tenant of the freehold of the manor of *B.* of which *J.* and *S.* his wife are tenants returned, that is an implication that *J.* and *S.* are not tenants of it, and therefore bad; for a *non-tenure*, though it were expreſsly pleaded, is not a good plea to a *ſcire facias* upon a judgment in a perſonal action, becauſe it is directly to falſify the return of the ſheriff. It has been a queſtion, Whether a ſpecial *non-tenure* can be pleaded in that caſe? but that it may is now ſettled (*a*). But in a *ſcire facias*, to have execution of a judgment in a real action one may plead *non-tenure* againſt the return of the ſheriff, becauſe there the freehold, ſo much favoured in law, is at ſtake.

S. C. 1. Salk. 40. S. C. 2. Salk. 603. 679. S. C. 3. Salk. 321. S. C. Lilly Ent. 398. Poſt. 256. 2. Keb. 587. 636, &c. 1. Sid. 436. 1. Mod. 28.

Beſides, as to the pleading of this *in abatement*, if the ſheriff has returned all the *terre-tenants* in his county, it is altogether improper to plead *in abatement* that there are other tenants in another county not returned; becauſe, in that caſe, there are none to be ſummoned by that ſheriff; and the ſheriff having returned all in his county, has done his duty. But if it be pleaded, that there are other tenants in the ſame county, the regular and neat way is to conclude, by demanding judgment, if they ought to be put to anſwer *quouſque* the other be ſummoned; for which ſee the precedent in the caſe of *Jefferſon v. Dawſon* (*b*). It is true, that precedents are both ways, but judgment is never according to the concluſion here, *quod breve caſſetur*; but only to ſtay *quouſque*; for judgment ſhall not be to abate a writ but where the plaintiff may have a better.

(*a*) See the Year-Books 8. *Edw.* 4. pl. 19. 9. *Hen.* 5. pl. 11. and the caſe of Flud *v.* Pennington, Cro. Eliz. 872.

(*b*) 2. Saund. 23.

And

ADAMS *against* TERRE-TENANTS OF SAVAGE.

* And HOLT, *Chief Juſtice*, quoted the caſe of *Kemp v. Laurence (a)*, where it was held, that a tenant for years is a good tenant to plead in bar to a *ſcire facias* on a judgment for debt or damages; becauſe that is only in the perſonalty; *ſecus* to a judgment in the realty. If one jointenant be returned, he may plead that another is tenant of a moiety.

And by THE COURT a *reſpondeas ouſter* was awarded.

(*a*) Owen, 134.

Fitz-Hugh *againſt* Dennington. Caſe 330.

ERROR OF A JUDGMENT in THE MARSHAL'S COURT in debt upon a bond. The defendant, upon *oyer* of the bond, which recited, that the plaintiff was become an apprentice to the defendant for ſeven years, and was conditioned, "that "if the defendant, at the end of the ſaid ſeven years, ſhould make, "procure, or cauſe, the plaintiff to be made free of THE COMPANY "OF JOINERS of *London*, if thereunto requeſted, then the obliga- "tion to be void," pleaded, that *ad finem* of the ſaid ſeven years, or after, until time of action brought, he was not requeſted. To which the plaintiff demurred.

Judgment was given for the plaintiff below, ſuppoſing the requeſt not material at all, or at leaſt if it were that the plea ſhould have been, "that he never was requeſted," and not to tie it up to a requeſt at the end of the ſeven years, or after; for he might have requeſted before the end of the ſeven years to make him free at the end of the ſeven years.

But MONTAGUE, *for reverſing the judgment*, inſiſted, that if in this caſe the requeſt had not been expreſsly made part of the condition, yet the plea would not have been good: and he took a diverſity, that when there is a duty made by the bond, there needs no averment of a requeſt; but otherwiſe when the bond is for doing a collateral act, as here: and for this he quoted 1. *Brownl.* 13. But whenever the condition is to do a thing "when thereunto re- "quired," or "if thereunto required," there the requeſt is part of the condition, and muſt be averred.

PER CURIAM. The requeſt is material here: The meaning is plain, from the recital, that the defendant was to have made the plaintiff free at the end of ſeven years, that is, when his time was out, if the plaintiff pleaſed, which was to be ſignified to the defendant by requeſt; and the requeſt muſt be when the condition could be performed, *viz.* at the end of ſeven years, and not before; and if it were a good requeſt within the ſeven years, that ought to be ſhewn on the plaintiff's ſide, otherwiſe it ſhall not be intended; for it cannot be intended that one would requeſt a thing to be done before it was to be, or could be, done.

And the judgment was reverſed *niſi (a)*.

If a *maſter* give a bond to make his *apprentice* free of the city at the end of ſeven years, *if requeſted*, the defendant may plead, to an action of debt on this bond, "that at the end "of ſeven years, "or after, he "was not re- "queſted, &c." for he was not bound to do it, except upon requeſt made at the time appointed for the performance.
S. C. poſt. 259.
S. C. 2. Salk. 585.
S. C. 3. Salk. 309.
S. C. Holt, 68.
S. C. 2 Ld. Ray. 1094.
Ante, 223.
1. Lev. 85.

(*a*) This caſe was moved again, and after a ſecond argument the Judges gave their opinions *ſeriatim*; and the judgment was unanimouſly reverſed. S. C. poſt. 259. 261.

Caſe 331.

* Robert *againſt* Harnage.

A declaration in debt on bond, conditioned to pay "to *A.* his "attorney or "aſſigns," is maintained by evidence of a bond "to pay "to the attor- "ney of *A.* or "his aſſigns."

S. C. 2. Salk. 659. Hob. 171. Cro. Eliz. 256. 1. Stra. 76. 1. Burr. 325.

THE PLAINTIFF declared, that the defendant became bound to him at *Fort St. David's*, in the *Eaſt Indies*, at *London*, in a bond of ———, for the payment of ———, to him, his attorney, or aſſigns.

Upon *oyer*, the bond appeared to bear date at *Fort St. David's*, in the *Eaſt Indies*: and the *ſolvendum* was to the plaintiff's attorney or aſſigns, without mention of himſelf.

And on demurrer to the declaration two exceptions were taken:

FIRST, That the bond declared on, and that ſet out on the *oyer*, were variant; the one being "*ſolvendum* to him, his attorney, or "aſſigns;" the other, "to his attorney or aſſigns."

To which it was anſwered, that the declaration muſt not be according to the letter of the obligation, but according to the operation of the law thereupon: as if *A.* bind himſelf in a ſum to *B. ſolvendum* to *C.* who is a ſtranger, a payment to *C.* is a payment to *B.* and in an action upon it the count muſt be upon a bond *ſolvendum* to *B.* (*a*).

And PER CURIAM, If *A.* make a bond to *B. ſolvendum* to ſuch perſon as he ſhall appoint, if *B.* do appoint one, payment to him is a payment to *B.*; and if *B.* appoint none, it ſhall be paid to *B.* himſelf.

If a bond bear date at any place *abroad*, that *place* muſt be ſtated in the declaration with a *viz.* at ſuch a place in *England*.

S. C. 2. Ld. Ray. 1043. Ante, 154.

SECOND EXCEPTION was, that the bond ſet forth appeared to have been ſealed and delivered at *Fort St. David's*, in *the Eaſt Indies*, and therefore the date made it local; and by conſequence, the declaration ought to have been of a bond made "at *Fort St.* "*David's* in *the Eaſt Indies*, at *Iſlington* in the county of *Mid-* "*dleſex*," or "in ſuch a ward or pariſh in *London*, *&c.*" as upon a bond "*apud* BOURDEAUX in *France*, in *Iſlington*."

And of that opinion was THE COURT.

Co. Lit. 261. Latch. 4. 10. Mod. 255. 2. Ld. Ray. 1212. and ſee the caſe of Fabrigas *v.* Moſtyn, Cowp. 178. 181. and Ilderton *v.* Ilderton, 2. H. Bl. Rep. 160, 161.

(*a*) Year-Book 4. *Edw.* 4. pl. 19. 2. Keb. 81. 1. Sid. 295.

Caſe 332.

Peat's Caſe.

Previous to the 10. *Anne*, c. 3. a *diſſenter* might be proſecuted in the county in which he reſided, though qualified in another.

S. C. poſt. 310.

PEAT was a preacher to a meeting of diſſenters; and having qualified himſelf as ſuch, according to THE TOLERATION ACT (*a*), in one county, removed from thence into another county, and ſet up a conventicle there, without any further qualification; whereupon a juſtice of peace convicted him upon the *ſtatute of Conventicles* (*b*).

S. C. 2. Salk. 572. 2. Salk. 673. 4. Com. Dig. "Juſtices of Peace" (R. 16.).

(*a*) 1. *Will. & Mary*, c. 18. (*b*) 22. *Car.* 2. c. 1.

THE

THE ATTORNEY GENERAL, in his behalf, moved for *an attachment* againſt the juſtices for *a contempt* of THE TOLERATION ACT, alledging, that a qualification in one county is a qualification all over *England*. PEAT's CASE.

But PER CURIAM, The *act of Conventicles* is ſtill in force, and the juſtices of peace have power of executing it againſt ſuch as do not qualify themſelves according to THE TOLERATION ACT, which act only enjoins the juſtices of peace to acquit ſuch as do comply with THE ACT OF TOLERATION. So they being judges of the matter, if they * wrong you, you have your remedy by *certiorari* (*a*), or appeal to the ſeſſions, where the whole fact may be heard and examined over again; which examination of the fact ſhall be final by the very words of the ſtatute; and if they err in a matter of which the law makes them judges, it would be moſt unreaſonable to grant *an attachment* for ſuch error. * [229]

THE ATTORNEY GENERAL then moved for a *mandamus* to the juſtices to ſuffer him to preach there, he qualifying himſelf according to THE ACT OF TOLERATION. A *mandamus* does not lie to ſuffer a diſſenting miniſter to preach.

But THE COURT denied it; for a *mandamus* is always to do ſome act in execution of law; but this would be in the nature of a writ *de non moleſtando*, and that contrary to a conviction ſtanding againſt you, which ſhall be looked upon as legal while it ſtands.

THEN they moved for a *mandamus* for the juſtices to take ſecurity from him not to become chargeable to the pariſh: A *mandamus* does not lie to oblige a diſſenting miniſter to give ſecurity.

Which was alſo denied; for that matter is only to be upon complaint of the churchwardens and overſeers of the poor.

AND THEY HELD, that, by THE TOLERATION ACT, it ſuffices not that the licence of ſuch preacher be inrolled at the quarter-ſeſſions of one county to enable him to preach in any other county; but it ought to be at ſuch quarter-ſeſſions as would otherwiſe have conuſance of the matter upon the *ſtatute of Conventicles*, and that is the ſeſſions of the county where the fact is committed (*b*). How the qualification of a diſſenting preacher ſhall be inrolled.

THEN they moved for a *mandamus* to the ſeſſions to ſtate the fact ſpecially. A *mandamus* does not lie to ſeſſions to ſtate a *ſpecial caſe*.

But it was denied, for that the ſtatute excludes all others from examining the fact.

AND, FINALLY, they moved for a *procedendo* to a *certiorari* already brought by them, in order to appeal to the ſeſſions: which was granted. A *procedendo* ſhall be awarded to enable the parties to appeal.

(*a*) It is ſettled, that a *certiorari* will lie upon this ſtatute, Rex *v.* Morley and Others, 2. Burr. 1040.

(*b*) But by 10. *Anne*, c. 3. ſ. 9. "If "a diſſenting miniſter be qualified ac- "cording to the Toleration Act, he may "officiate in any congregation, although "the ſame be not in the county wherein "he was ſo qualified, provided the meet- "ing-houſe has been regiſtered, and a "certificate of his having qualified left "with the clerk of the peace of the "county in which he qualified." See alſo 19. *Geo.* 3. c. 44. 1. Hawk. P. C. ch. 16. ſect. 22. to 33. 7th edition.

Caſe 333.

Anonymous.

Proceedings on bail-bond ſet aſide, becauſe no *capi corpus* returned.

PER CURIAM. The ancient rule was, that a bail-bond could not be put in ſuit until a rule was obtained to amerce the ſheriff for not having the body forthcoming.

And now proceedings upon the bail-bond were ſet aſide, becauſe there was no *capi corpus* returned (*a*).

(*a*) See 1. Sid. 23. 2. Mod. 84. But this practice of giving a rule for the ſheriff to bring in the body before the plaintiff could take an aſſignment of the bail-bond, is now altered by the ſtatute 4. & 5. *Anne*, c. 16. ſ. 20. which enacts, "that the ſheriff, at the requeſt and coſts of the plaintiff, ſhall aſſign to the plaintiff the bail-bond, or other ſecurity taken from the bail, by indorſing the ſame, and atteſting it under his hand and ſeal, in the preſence of two or more witneſſes, which may be done without ſtamp, provided the aſſignment ſo indorſed be duly ſtamped before any action brought thereon; and if the ſaid bail-bond or aſſignment, or other ſecurity taken for bail, be forfeited, the plaintiff may bring an action thereupon in his own name: and the Court may, by rules, give ſuch relief to the plaintiff and defendant in the original action, and to the bail upon ſuch bond, as is agreeable to juſtice and reaſon: and ſuch rules ſhall have the nature and effect of a defeaſance to ſuch bail-bond, &c." See Barnes, 77. 2. Stra. 1262. 2. Black. Rep. 876. Tidd's Practice, 155.

Caſe 334.

Brewſter *againſt* Weld.

A *ſcire facias* may be ſued by any perſon who is prejudiced by A PATENT, as well as by the king.
4. Inſt. 72.
2. Vent. 244.
3. Lev. 221.
2. Keb. 373.
Bro. *Sci. Fac.* 104. acc.

SCIRE FACIAS out of chancery, returnable in THE QUEEN'S BENCH, to repeal letters patents of the rectory of *Aldgate*.

It was moved, that the ſheriff might return his writ.

And here IT WAS RESOLVED, that if letters patents be to the prejudice of another, he may have a *ſcire facias*, upon the inrolment thereof in chancery, to have them repealed, as well as THE QUEEN may; as if a fair be granted to the damage of mine, I may have a *ſcire facias* to repeal ſuch grant.

Dyer, 197. 5. Com. Dig. "Patents" (F. 6.). 2. Vent. 344. 3. Lev. 220. Vid. 5. Com. Dig. "Patent" (F. 7.).

In what manner a *ſcire facias* out of chancery to repeal letters patent ſhall be returned.

AND THEY SEEMED LIKEWISE TO HOLD, that a *ſcire facias* upon a record in *chancery* was not returnable here.

But clearly after a writ iſſues out of *chancery* returnable in another court, that court into which it is returnable has juriſdiction of it, and not *the chancery*, nor can the *chancery* ſuperſede ſuch writ; but all the irregularity, both in iſſuing it out and in the return of it, is ſolely examinable in the court in which the writ is returnable; which, if the writ be legal, will hold plea upon it, but otherwiſe will quaſh it.

* [230] But the * motion being the *quarto die poſt*, all which day the ſheriff has to return the writ, THE COURT would not make a rule.

The ſame motion being made the next day, the Court was informed, that THE CHANCERY had ſuperſeded the writ; whereupon, in ſome heat, they ruled the ſheriff to return it, or to return the *ſuperſedeas*, if he depended on it that it would excuſe him.

The day after, the ſheriff having got the writ back from THE CHANCERY, returned it *ſcire feci*, and brought it into court.

Anonymous.

Anonymous. Case 335.

A FEME COVERT may plead "*non aſſumpſit*," and give *coverture* in evidence, becauſe *coverture* makes it no promiſe; ſo ſhe may plead "*non eſt factum*" to a bond, and give *coverture* in evidence (*a*).

A married woman may give *coverture* in evidence under the *general iſſue*.

Poſt. 218. Ray. 395. 12. Mod. 609. 1. Show. 50. Co. Lit. 132. Lut. 23. 1. Salk. 8. Theol. Dig. l. 12. c. 12. Stra. 811. Com. Dig. "Abatement" (E. 6.). (F. 2.). (H. 42. Com. Dig. "Pleader" (2. W. 21.).

(*a*) See Year-Book 4. *Hen.* 4. pl. 30. Com. Dig. "Pleader" (2. A. 1.). Milner *v.* Milnes, 3. Term Rep. 627. Gilb. Evid. 162. Dixon *v.* Davis, 1. Stra. 480. Weſtbrooke *v.* Strutville, 1. Stra. 79.

Cockroft *againſt* Smith. Caſe 336.

THE DEFENDANT in a ſcuffle bit off the forefinger of an attorney's right hand:

Bail in treſpaſs. Poſt. 266. 1. Mod. 2.

And in treſpaſs, with a ſpecial *ac etiam* by a judge's warrant, the queſtion was, Whether the bail ſhould not juſtify themſelves to a ſum ſuitable to the *ac etiam*?

And PER CURIAM, He was not held to that, he being very poor.

Gibbon *againſt* Dove. Caſe 337.

PER CURIAM *et* OMNES CLERICOS. Upon a writ of error, and bail put in, the defendant has *twenty days* to except againſt the bail, which exception ought to be entered in the clerk of the errors book.

Time to except againſt bail put in upon a writ of error, &c. S. C. 3. Salk. 56. Ante, 24. 1. Com. Dig. "Bail" (K. 4.).

He ought further to take out a rule to ſerve upon the attorney or agent of the plaintiff to put in better bail; but that rule need not be ſerved within the twenty days, but it muſt be before execution ſued out for want of bail.

NOTE, It was ſaid, that there ought to be notice of the exception within twenty days.

Notice of the exception.

Jacob *againſt* Dallo. Caſe 338.

PROHIBITION was moved for to THE SPIRITUAL COURT, to ſtay a ſuit there about the right of diſpoſing of *pews* in a church.

A ſuggeſtion to prohibit the ſpiritual court from proceeding on a right to *a pew*, muſt ſhew whether THE CHURCH was *preſentative* or *donative*. 1. Keb. 457.

The ſuggeſtion was, that ſuch A CORPORATION were *impropriators* of it, and time, &c. uſed to repair all the pews, and *ratione inde* had the diſpoſal of them.

But becauſe it did not appear to THE COURT, whether it were *preſentative* or *donative*, or with *cure of ſouls* or not, they would do nothing in it.

A church, whether *donative* or *ſtipendiary*, may have the cure of ſouls.
S. C. 5. Mod. 436.
S. C. 2. Salk. 551.

BUT THEY SAID, that a *donative* might be with cure of ſouls, as the chapel in the TOWER OF LONDON: and that there is alſo another kind of church, which is neither *preſentative* nor *donative*, but *ſtipendiary*, and yet has *cure of ſouls*: as if there be an impropriation, and it has no vicarage, but only a certain ſtipend is given yearly to him that ſerves the cure; and that is merely dative, and at the pleaſure of the impropriator.

S. C. 7. Mod. 8. S. C. 2. Ld. Ray. 755. S. C. 12. Mod. 233.

*[231]

Anciently no *pews* in churches.

* NOTE likewiſe it was ſaid, that anciently there were no *pews* in churches, but only *forms*.

How a preſcription in A CORPORATION to a pew in a church may be pleaded.
1. H. Bl. Rep. 310. 1. Kyd on Corp. 296.

And that it had been a good preſcription to ſay, "that time out "of mind THE CORPORATION did repair ſuch an aiſle of the "church, *ratione cujus* the mayor and aldermen ſat there;" for though the right be in the whole body, the enjoyment may be in and enure to a ſelect number.

Caſe 339. Anonymous.

Bail may take their *principal* at any time, even on a *Sunday*, to ſurrender him in their diſcharge.
Poſt. 247.
7. Mod. 77. 85. 98.
1. Atk. 239.
Tidd's Pract. 53. 247. 1. Com. Dig. "Bail" (A.). 2. Hawk. P. C. ch. 15. ſ. 3. 1. Bac. Abr. 233. 2. H. Bl. Rep.

PER CURIAM. The bail have their principal always upon a ſtring, and may pull the ſtring whenever they pleaſe, and render him in their own diſcharge; they may take him up even upon *a Sunday*, and confine him until the next day, and then render him; for the entry in this court is *traditur in ballium*, &c. and the doing it on *a Sunday* is no ſervice of proceſs, but rather like the caſe where a ſheriff arreſts by virtue of a proceſs of court on *Saturday*, and party eſcapes, he may take him upon *a Sunday*, for that is only a continuance of the former impriſonment (*a*).

(*a*) But ſee the caſe of Brockes *v.* Warren, Eaſter Term, 19. *Geo.* 3. 2. Bl. Rep. 1273.

Caſe 340. Knight *againſt* Burton.

An award that *jointenants* ſhall make *partition* by mutual conveyances is good, although it do not point out what *part* each of the parties is to have.
S. C. 1. Salk. 75.
Poſt. 244.
Kydon Awards, 38.

DEBT UPON BOND conditioned for performance of an award, which was ſet forth, and a breach aſſigned: and upon demurrer

PARKER took exception:

FIRST, That the award recited, that the parties were *jointenants* of ſuch land, and ordered that they ſhould make *partition* by mutual conveyances.

This was ſaid to be uncertain, and not making an end of the matter by ſhewing what moiety, or part, the one ſhould have, and what the other.

To which it was anſwered, AND RESOLVED, that it was well enough; for as they were *jointenants* before, they would now become *tenants in common*.

SECONDLY,

SECONDLY, It was objected, that could not be; for it was further awarded, that the one ſhould have *unam dimidiam partem five medietatem*; which ſhews they intended ſomewhat more than a *tenancy in common*, but left it uncertain; for *dimidia pars* is a moiety in certainty, and *medietas* is a moiety uncertain; and in this very award, they, in other matters, uſed "*medietas*" for a moiety in certainty; as *medietas* of the profits of ſuch a ſhip to be delivered, which is to be underſtood of a moiety divided, for otherwiſe it could not be delivered.

How "*dimidia pars*," or "*medietas*" ſhall be reſpectively taken.

But PER CURIAM, "*Dimidia pars*," or "*medietas*," ſhall be reſpectively taken for moiety divided or undivided, *ſecundum ſubjectam materiam:* as *medietas* of a thing to be delivered ſhall be underſtood a divided moiety, becauſe it cannot be delivered except it be divided; ſo *dimidia pars*, if it be ſuch a thing as cannot be reduced to a divided moiety, ſhall be underſtood a moiety undivided: as in *dower*, if a woman demand *tertiam partem*, and it be of ſuch a thing as is capable of having a third part divided made of it, it ſhall be ſo; but if it be of a *third part* of lands of tenant in common, mill, &c. it muſt be a third part undivided.

* [232]

* THIRDLY, It was objected, that they awarded money to be paid, which of their own ſhewing upon the face of the award did not appear to be due; for it was, "Whereas ſo much money "has been diſburſed by the one party, *as is alledged*:" ſo that though if they had ſaid, "Whereas ſo much money has been diſ- "burſed," it would be intended that it appeared to them to have been ſo, yet when they go farther, and ſay, "as is alledged," they take away ſuch intendment; for they ſhew their certainty of it was only becauſe it was alledged, which might be without any proof, or allegation by any perſon whatever.

An award, that "whereas ſo "much money "had been diſ- "burſed, *as is* "*alledged*," is good. Ante, 229. Skinner, 156, 159, 188.

But IT WAS RESOLVED, that "*alledged*" ſhould be underſtood as alledged, and not controverted or diſproved by the other ſide.

FOURTHLY, It was objected, that it was awarded that a ſuit between the parties in chancery ſhould be diſmiſſed; which, as was urged, was ill, for that an award ought to be final, and that a ſuit in chancery might be diſmiſſed upon payment of coſts, ſo as the party might begin again. Indeed, if the diſmiſſing be abſolute it is final; but if it be diſmiſſed, as is frequently done there, without prejudice, the party may begin again; and therefore an award of diſmiſſing a ſuit in chancery is uncertain and not final, but is like the awarding that one of the parties in a ſuit at law be nonſuited, which is void.

An award that a ſuit between the parties in chancery ſhall be *diſmiſſed*, is good; for it ſhall be taken to mean, that the ſuit ſhall ceaſe *for ever*, and therefore *final*. Ante, 33.

But PER CURIAM, It is true, an award that one of the parties be *nonſuit*, is void, for that is not *final*; but when an award is, that a ſuit commenced be *diſmiſſed*, that muſt be underſtood that it ſhall be diſmiſſed and ceaſe for ever; that is a ſubſtantial diſmiſſion and *ceſſer*, and not the ſhadow of one: as if the condition of a bond be to deliver up another bond by ſuch a day to be cancelled, and the

1. Salk. 74. Kyd, 142.

KNIGHT *against* BURTON.

obligee before the day puts the first bond in suit, and obtains judgment thereupon, and at the day tenders it to be cancelled according to the letter of the condition of the second obligation, yet his obligation is forfeited. The word "dismissing" here is put in *Latin* "*dimittere*," with an ANGLICE "to discharge," and to discharge a suit is to release it, and therefore final. If an action be depending upon a bond, and, *puis darrein continuance*, the plaintiff release the action, that releases the duty. Besides, this award is, that what is awarded of the other side "shall be in full of all debts and demands then due and owing;" and the word "*demands*" extends to all things that the one party has a right to demand or exact of the other at the time of the submission; and the words "*due and owing*" do not qualify or restrain it to a debt, or other special demand, that is, more strictly speaking, a duty; for whatever a man has a right to demand or another, may well be said to be "due and "owing" from the other to him; so it may extend to a right of entry into land, to a suit for partition, &c.

A stated rule in awards that are said to be *de et super præmiss.* Post. 254.

1. Salk. 70. Kyd, 113. 160.

NOTE, This was agreed to be a stated rule in awards that are said to be "*de et sup. præmiss.*" that if the words used in them be in their own nature more comprehensive, and so extensive to things not within the submission, yet they shall be intended that there was no other matter between the parties for them to lay hold on but what was submitted, if the contrary be not shown: so *è converso*, if the words are more narrow and less comprehensive than to take in all the * matter of submission, yet it shall be intended that no more was in controversy than what the words naturally comprehend, if the contrary be not likewise shewn.

* [233]

And judgment *nisi* was given for the plaintiff by THE WHOLE COURT.

Case 341. Selby *against* Greene.

In debt on bond, if the defendant, on *oyer*, discover that a material razure has been made in the condition, and plead *non est factum*, and the plaintiff, perceiving the erasure to be detected, countermands notice of trial, yet the Court will not impound the bond. Post. 237.

THE OBLIGEE made a material razure in the condition of a bond (*a*), and afterwards brought an action upon the bond. The defendant having had *oyer*, and the bond being now in court, and the razure discovered, the defendant pleads "*non est factum*," and notice of trial was given; but when the plaintiff understood that the defendant had found out the cheat, and could prove it, he countermands the notice of trial.

DARNELL, *Serjeant*, now moved upon affidavits of this matter, that the bond should remain in the custody of the officer of the court until the cause were tried; for otherwise the plaintiff would stay until the defendant's witnesses were dead, and put this forged bond in suit against him, when he could by no possibility relieve himself against it: and now if he would try it by PROVISO, the plaintiff would be nonsuited, and might begin again.

2. Buls. 247. 11. Co. 28. 5. Co. 23. Dyer, 261. 2. Roll. 30. Cro. Eliz. 546.

(*a*) See the case of Miller *v.* Master, 4. Term Rep. 320.; and Master *v.* Miller, 2. H. Bl. Rep. 141.

PER

SELBY *againſt* GREENE.

PER CURIAM. If you had denied the deed, according to *Weymark's Caſe (a)*, it is to remain in court until the cauſe be tried; otherwiſe it ſhall only remain for the Term in which it is brought in: but the moſt it goes to is, that upon *imparlance* granted it ſhould remain in court until the defendant pleads: as here, if it be by bill, the defendant after imparlance may crave *oyer*; and therefore there it muſt remain in court until the party is put to plea (*b*), that he may in that caſe have *oyer* of it.

2. Salk. 497. Vide poſt. 303.

And HOLT, *Chief Juſtice*, remembered *Sir Solomon Swale's Caſe (c)* in his time, where a deed, upon evidence, was found not to be the defendant's deed, and by conſequence forged; and it was inſiſted on, that the Court ought to cancel it: yet the Court denied it, becauſe there might be error in the proceedings for which the verdict might be ſet aſide, and then the bond would ſtand unimpeached, and ſo the matter be brought in queſtion again; and ſo it was reſolved that it ſhould not be cancelled, but remain in Court uncancelled.

And THE COURT ſaid, that the defendant's beſt way would be to carry the cauſe down BY PROVISO; and if the plaintiff would ſuffer himſelf to be *nonſuited*, whereby the ſuit will be at an end, and the plaintiff entitled to take his bond out of court, yet that nonſuit would be great evidence againſt him in another action to be brought thereupon; or elſe he might get his witneſſes teſtimony perpetuated in the court of CHANCERY.

* DARNELL ſaid, that he might bring an action upon his caſe againſt the plaintiff for ſuing him upon a forged bond, and that a verdict therein would be evidence for him, it being between the ſame parties. * [234]

And ſo he took nothing by his motion.

(*a*) (*c*)
(*b*) 5. Co. 74. Co. Lit. 231. 5. Com. Dig. "Pleader" (P. 1.).

Godolphin *againſt* Tudor. Caſe 342.

Eaſter Term, 3. Anne, Roll .

DEBT UPON A BOND conditioned for performance of articles. The condition recited, "THAT WHEREAS *Sir William Godolphin* was auditor of *Wales* for his life, and had deputed the defendant's teſtator to exerciſe his ſaid office during his good behaviour, and that the defendant *pro deputatione præd.* did agree to pay a bond given by ſuch deputy to pay his principal yearly, during the ſaid deputation, two hundred pounds, and that in conſideration thereof the deputy ſhall have all the rents and profits of the ſaid office to his own uſe, is void by the ſtatute 5. & 6. *Edw.* 6. c. 16.; for it is a bond to pay a certain ſum at all events. —S. C. ante, 38. S. C. 2. Salk. 468. S. C. 3. Salk. 251. Poſt. 237. 3. Inſt. 148. Hob. 75. Co. Lit. 234. 3. Keb. 552. 659. 678. Cro. Car. 361. Cro. Jac. 269. 386. 2. Salk. 466. Cro. Eliz. 529. Comy. Rep. 2. 1. Hawk. P. C. ch. 67. ſ. 5. 4. Burr. 2497. 2. Ch. Caſes, 42. 5. Com. Dig. "Officer" (K. 1.). If a perſon hold an *auditor's* office for life, and depute another to exerciſe the ſaid office during his good behaviour,

him

GODOLPHIN *againſt* TUDOR.

him yearly, during the ſaid deputation, two hundred pounds, in conſideration whereof the defendant's teſtator ſhould have all the rents and profits of his ſaid office to his the defendant's uſe, and likewiſe ſave the plaintiff harmleſs, &c. and the bond was for performance thereof.

The defendant pleads the ſtatute of 5. & 6. *Edw.* 6. c. 16. &c. making bonds and ſecurities, &c. for certain offices void, without the neceſſary averments, &c.

The plaintiff replies, that the ſaid office had a fixed ſalary of twenty pounds a-year belonging to it, and that during the whole time of the ſaid deputation the annual, juſt, and legal profits of the ſaid office did amount to three hundred and twenty-nine pounds and ten ſhillings, and that during all the aforeſaid time the defendant did receive yearly the ſaid ſum of three hundred and twenty-nine pounds and ten ſhillings out of THE EXCHEQUER for the fees and profits of the ſaid office to his own uſe: and aſſigns breach in not paying the ſaid two hundred pounds for ſo many, &c.

The defendant rejoins the ſame matter as in the replication: and demurrer.

THE CASE being three times argued in this and the two precedent Terms,

THE COURT were clearly of opinion againſt the plaintiff; and took this diverſity, that if an office deſcribed by the ſtatute have a certain ſalary annexed to it, a deputation of ſuch office, reſerving a ſum leſs than the ſtanding ſalary, will not be within the ſtatute. So if fees be uncertain, and no certain ſalary annexed to the office, reſerving a certain ſum out of the fees will not be within the ſtatute; becauſe in that caſe, if the fees anſwer not the ſum certain, the deputy is not to pay the ſum certain, it being payable out of the profits. But here the event will not help it, it being void at firſt; for the fees being things ariſing from the buſineſs of the office, which may be more or leſs, they muſt be uncertain, and yet the defendant's teſtator, at all events, was to pay a ſum certain, let the fees be more or leſs (*a*).

So they adviſed the plaintiff to diſcontinue, which he denied.

Judgment was given for the defendant on the laſt day of the Term; and the ſaid diverſity allowed and confirmed for good law;

* [235] * for if one reſerve a ſum certain upon a deputation out of the profits or fees, he only reſerves part of that which was wholly his before; for though, by making a deputy, the whole power of the principal is in the deputy, yet the fees or profits do not paſs, and the deputy has no right to them: then if he make a deputy, reſerving, a ſum certain, part of the profits, and the reſt to deputy, he may well do it, for it is but reſerving part of what was wholly his (*b*).

(*a*) See Ellis v. Nelſon, 3. Keb. 717. 659.

(*b*) See the caſe of Garforth v. Fearon, 1. H. Bl. Rep. 327.

NOTE,

NOTE; If one put in a deputy without any allowance of ſalary, he has no remedy but by *quantum meruit*, and that againſt his principal.

Quantum meruit for a deputy having no allowance.

Davenant *againſt* Rafter. Caſe 343.

ERROR OF A JUDGMENT in the court of common pleas upon *nil dicit* in debt upon a bond, for want of an original. The defendant pleads *a releaſe of errors*. The plaintiff replies, that there was another judgment between the parties for the ſame ſum, and of the ſame Term, and that the releaſe was of that judgment of which the writ of error was not brought, ABSQUE HOC that it was of this now in queſtion. To which the defendant demurs.

In error on a judgment in debt, if the defendant plead a "releaſe of errors," the plaintiff cannot reply that the releaſe was of errors in another judgment, and traverſe its application to the judgment in queſtion.

EYRE maintains the demurrer, for by this *traverſe* the defendant is excluded from ſaying that there is but one judgment, for it is only made an inducement to the traverſe.

PER CURIAM. The queſtion is, Whether there ought to be a traverſe in this replication? for then you would cut out the plaintiff from pleading "*nul tiel record.*" But your way ſeems to have been, to have ſhewed one judgment ſpecially, and then to have averred the releaſe to have been of that judgment, and ſo have reſted. As ſuppoſe a man has two manors of *Dale*, and levies a fine of his manor of *Dale*, he ſhall by averment aſcertain of which of them it was. If debt be brought upon a ſheriff's bond conditioned for an appearance in this court *die Veneris prox. poſt menſ. Mich.* and the defendant plead a writ of *latitat* taken out againſt the party at the ſuit of the ſame plaintiff, returnable *die Mercurii*, and that the party was upon that writ arreſted, and the bond was given for his appearance at another day than the return-day of the writ, and ſo the bond is void by the ſtatute of 23. *Hen.* 6. c. 9. the plaintiff may come and ſay, that he took out a writ returnable *die Veneris*, and that an arreſt was upon that, and the bond for appearance to it, without traverſing the other writ; and if a thing, which may in proceſs of pleading become material and traverſable, be traverſed before ſuch time, it is naught, as my *Lord Hobart* ſays. Now you have not ſhewed how this matter was material.

S. C. 2. Ld. Ray. 1046. S. C. 3. Salk. 214. Ante, 113. 206. 174. Carth. 7. 99. 200. 339. 1. Sid. 84. Ld. Ray. 42. 237. 359.

* [236]

* ANOTHER OBJECTION was, that the releaſe pleaded recited a judgment in which the plaintiff recovered ſix hundred pounds *pro debito et damnis ultra miſis et cuſtagiis*. The errors in which the plaintiff releaſed, and the judgment of which this writ is now brought, is *pro debito et damnis* only, without any thing of *coſts*, and ſo a plain *variance* between the judgment releaſed, and that now in queſtion; for at common law, before any coſts were given, the form of entering judgments in debt was *pro debito et damnis*, as this is; and therefore the judgment recited in the releaſe, and that of which this error is now brought, are not the ſame.

If on error on a judgment *pro debito et damnis*, A RELEASE be pleaded reciting the judgment to be *pro debito et damnis ultra miſis et cuſtagiis*, the variance is not material.

But PER CURIAM, In the court of common pleas they always, in caſe of judgment by *nihil dicit*, enter judgment *pro debito et damnis*, without more; though in this court the manner be, *tam pro debito*

11. Mod. 2. Ld. Ray. 1047. 1221.

DAVENANT *againſt* RAFTER.

debito et damnis quàm pro miſis et cuſtagiis, and *damages* include *coſts*: and beſides, in the judgment recited in the releaſe it does not ſay that any *coſts* were recovered, but *ultra miſis et cuſtagiis* he recovered ſix hundred pounds for his debt and damages.

In what caſe a *certiorari ad audiendum errores* ſhall iſſue.
Ante, 206, 207.
Raſt. 300.
21. *Edw.* 4. 43.
3. Co. 14.

IT WAS ALSO OBJECTED, that judgment ought not to be affirmed without a *certiorari* to aſcertain to the Court how the matter ſtood below.

But THE COURT took this difference: If the defendant, upon error aſſigned, will not come in and plead, there the plaintiff muſt have a *ſcire facias* againſt him *ad audiendum errores*, and a *certiorari* to certify the want of an original, that being the error aſſigned; but where the defendant comes in *gratis*, and pleads *in nullo eſt erratum*, or other plea which is ill, it is a confeſſion of the error.

And the judgment was, "*nil capiat per breve*," becauſe here is error upon the record, but it is releaſed.

In what manner a plea of "releaſe of errors" may conclude.

NOTE, At another day it was objected, that the concluſion of the defendant's plea was naught; for it was, "*quod quer. &c. excludatur, et quod judicium affirmetur*," when by law the judgment is to be affirmed.

But this objection was over-ruled; for *quod quer. præcludatur* is enough, and the reſt ſurpluſage.

If iſſue be taken on a dilatory plea, it muſt conclude *petit judicium*; but if it confeſs and avoid, the concluſion muſt be in maintenance of the writ.
Jrſh. Leg. 272.

And here HOLT, *Chief Juſtice*, took this diverſity as to *concluſions*, that if a dilatory be pleaded, and the plaintiff take iſſue upon it, he may conclude with a *petit judicium et damna*, becauſe there *final judgment* ſhall be; but if a dilatory be pleaded, which the plaintiff does not deny, but confeſſes and avoids, he muſt conclude in maintenance of his writ: as if a defendant plead "*attainder*" in diſability of the plaintiff, and he replies "*a pardon*," he muſt not conclude with a *petit judicium et damna*, but in maintenance of his writ.

512. 523. Skinner, 387. 517. 2. Vent. 105. Salk. 601. 12. Mod. 399. 1. Peer. Wms. 258. Ld. Ray. 337. 339. 594. 853. 1018. Strange, 520.

* [237]

Caſe 344.

* Lady Cook *againſt* Remington.

In an action of debt on bond for performance of covenants, the defendant, in pleading covenants performed, muſt ſhew the indenture from the counterpart.
Ante, 234.
S. C. 1. Salk. 498. 1 Sid 50. 97. 423.

DEBT UPON A BOND, with condition to perform covenants in a certain indenture mentioned. The defendant craves *oyer* of the indenture, which the plaintiff gives him; and one of the covenants therein was, that the defendant would ſafely give up to the plaintiff the goods, a particular whereof was written on the back of the indenture. The defendant pleads *performance* generally: to which the plaintiff demurred.

And it was held PER CURIAM:

FIRST, That when one is bound to perform covenants in an indenture, in an action upon ſuch bond, the defendant, in order to diſcharge himſelf, ought to ſhew the ſaid deed to the Court, that

1. Keb. 104. 127. 1. Saund. 9. 22. 1. Med. 265. 1. Vent. 37. Keilway, 78. 1. Sid. 425. Cro. Jac. 360. 460. 1. Saund. 22. Stra. 227. 1186. 1198. 1241.

they

they may ſee what the covenants are; for he cannot ſhew that he has performed all, without ſhewing what he was to perform; and therefore he ought to recite the indenture, whereof he is ſuppoſed to have a counterpart, in his plea. LADY COOK *againſt* REMINGTON.

But if he never had a counterpart, or had loſt it, upon oath thereof, the Court will compel the plaintiff to give him a counterpart, in order to ſet it out for his defence.

SECONDLY, That though the plaintiff in this caſe was not compellable to give him *oyer* of the deed, yet if he will do it, it will ſuffice for the defendant to plead upon. If plaintiff gives *oyer* of a deed not declared on, the defendant may plead on it.—5. Com. Dig. "Pleader" (P. 1.).

THIRDLY, That the indorſement here, at the time of the enſealing and delivery of the deed, was part of it; and therefore *oyer* of the body of the deed, without *oyer* of the indorſement, was not a complete *oyer* of the deed, the deed relating to the indorſement, and therefore not perfect without it; and it differs in this from an obligation with a condition indorſed, for there may be *oyer* of the obligation without any of the condition; and if one crave *oyer* of the obligation, he ſhall not upon that have *oyer* of the condition, becauſe the obligation is complete and perfect without the condition, and does not refer to it. An *indorſement* on a deed, made at the time it was ſealed and delivered, is part of the deed itſelf. S.C. 1. Salk. 498. 2. Ter. Rep 641. 5. Com. Dig. "Pleader" (P. 1.).

FOURTHLY, If the indorſement were after the enſealing and delivery of the deed, and at another time, it is a new deed; and in that caſe, if a bond were to perform articles in one deed, and that deed refers him to another, there, to diſcharge himſelf, he muſt ſhew the matter in the ſecond deed that is referred to from the firſt. An indorſement made after ſealing and delivery of a deed is a new deed. Stra. 18. 3. Pr. Wms. 409.

FIFTHLY, Here where the plaintiff gave the defendant an incomplete *oyer*, VIZ. of the deed without the indorſement, he ought not to have reſted ſatisfied therewith, but to have ſet forth further the whole purport of the indorſement, or averred that there was none. Defendant not bound by the deed ſet forth on *oyer* prayed.

And judgment was given for the plaintiff *niſi*, &c.

* [238]

* Wells *againſt* Oſmond. Caſe 345.

LIBEL in the admiralty for *ſeamen's wages*. It appeared, that a builder made a contract for a ſhip with an owner; who thereupon had the ſhip put into his poſſeſſion, and contracted with ſeamen to go with him on a voyage; and in order to rig the ſhip for that voyage, the owner brought the ſeamen to work for a conſiderable time on board the ſhip; after which, through diſagreement between the builder and the owner, the voyage was put off, and the ſeamen diſmiſſed without their wages: They now libel for their wages againſt the ſhip. If the owner of a ſhip contract with ſeamen to go the voyage, and, in order to haſten the outfit, they do work on board the ſhip while ſhe continues in harbour, and the owner afterwards diſmiſſes the ſeamen without going the voyage, they may ſue in THE ADMIRALTY for their wages, although the work was done within the body of a county.—S. C. 2. Ld. Ray. 1044. 1. Salk. 33. 33. 2. Salk. 424. Ante. 25. 3. Mod. 244. Ld. Ray. 398. 632. 576. 639. 650. 739. 1206. 1211 1247. 1453. 12. Mod. 405. 408. 440. 526. Comy. Rep. 74. 137. Stra. 707. 858. 937. 968. 405.

A prohibition

WELLS *againſt* OSMOND.

A prohibition was moved for, upon ſuggeſtion that the work was done *in corpore com.* and no voyage ever made.

But BY THE COURT, If a contract be made with ſeamen to go on a voyage, and they, in order thereunto, work in a harbour, and afterwards the voyage is intercepted through the owner's fault, as if the ſhip be arreſted for his debt, &c. the ſeamen ſhall ſue in the admiralty for their wages for the work done ſo in harbour in purſuance of the contract to go on a voyage, as much as if they had gone the voyage; but otherwiſe, if the retainer of them had been only to do the work in the harbour (*a*): and in this caſe the ſhip ought to be liable for their ſuit, becauſe the builder, by truſting it into the owner's poſſeſſion, gave him an opportunity of engaging of ſeamen, who are the eaſier induced becauſe they ſee him in poſſeſſion of it; and they, being ſtrangers to the builder's bargain with the owner, ought not to ſuffer by its not being performed; and the builder might have taken care to ſecure himſelf from any ſuch charge when he entruſted the owner with the poſſeſſion of his ſhip, whereby he rendered it obnoxious to the wages of ſuch ſeamen as he ſhould bring on board her in order to go a voyage in her.

And the motion for a prohibition was denied (*b*).

The reaſon why ſeamen may ſue in the admiralty. 2. Wilſ. 265.

And PER CURIAM, The true reaſon why ſeamen may ſue for their wages in THE ADMIRALTY, though the contract be on land, is, that there the ſhip itſelf is made liable to them (*c*); and beſides, there they may all join in the ſuit; neither of which may be at common law, and yet both are much for the eaſe of poor ſeamen.

(*a*)

(*b*) See the caſe of Roſs *v.* Walker, 2. Wilſ. 264. where this caſe is recognized as law —But a pilot who is ſent for from *Graveſend*, and goes from thence on board a ſhip lying in *Sea Reach*, and pilots her from thence to her moorings at *Deptford*, though *a mariner*, cannot ſue in the admiralty for the pilotage; for both the contract and the work done were within the body of a county, 2. Wilſ. 265.

(*c*) See Howe *v.* Nappier, 4. Burr. 1945.

Caſe 346.

Anonymous.

At what time bail may ſurrender the principal, though notice be not given to the plaintiff.

8. Mod. 340.
1. Ld. Ray. 157.
1. Stra. 198.
1. Wilſ. 270.
3. Burr. 1360.
Abr. 217.

PER CURIAM. If bail ſurrender the *principal* at or before the return of the ſecond *ſcire facias*, it is good, though there be not immediate notice of it to the plaintiff; for the end of notice in that caſe is twofold: one, that the plaintiff may, if he pleaſe, charge him in execution; the other, that he be at no further trouble or charge in proceeding againſt the bail: but if, through want of notice, he is at further charge againſt the bail, that ſhall not vitiate the ſurrender; but yet the bail ſhall not be delivered until they pay ſuch charges.

4. Burr. 2134. Tidd's Pract. 245. 250. 1. Com. Dig. "Bail" (Q. 4.). 1. Bac. Abr. 217.

If at * any time, after the return of the *capias*, the *bail* ſurrender *the principal* at a Judge's chamber, and he thereupon is committed to THE TIPSTAFF, from whom he eſcapes, or is reſcued, that will not be a good ſurrender, becauſe it is indulgence to the bail to ſurrender after a *capias* returned; *ſecus* if it be before a *capias* returned, for to ſurrender before, or at the return of the *capias*, is a matter of right.

If a *principal* be committed to a tipſtaff, on a ſurrender at a Judge's chambers, and eſcapes, *the bail* are liable.

And now by the rule of Court, upon the firſt ſort of ſurrender the principal ought to be two days in the marſhal's cuſtody to make it a good ſurrender.

Tidd's P. 147.

Ride *againſt* Ride. Caſe 347.

A POPISH RECUSANT convict made his wife, and another popiſh recuſant, his executrix. The ſpiritual court would ſuffer her to prove the will.

The wife of a popiſh recuſant cannot be executrix to her huſband.

A prohibition was moved for, upon the ſtatute of 29. *Eliz.* c. 6. ſ. 22. (*a*).

S. C. 3. Salk. 133. 239. 2. Salk. 552. 1. Hawk. P. C. ch. 12. ſ. 10. 10. Mod. 115. 357. 406. 483. 512. 536. Gilb. Eq. Rep. 237. 1. Peer. Wms. 353. 2. Peer. Wms. 3. 132. 135. 361. 3. Peer. Wms. 49. Comyns, 169. 207. 307. 570. Stra. 267. 318. 1096.

PER CURIAM. It was granted, for ſhe is diſabled by the general clauſe, and not enabled by the *proviſo*.

(*a*) See alſo 3. *Jac.* 1. c. 5. ſ. 10.

The Queen *againſt* Foxby. Caſe 348.

JUDGMENT upon an indictment at the quarter-ſeſſions of *Maidſtone* was reverſed; the indictment being, for that ſhe was *communis rixa*, a common ſcold, inſtead of *rixatrix*.

"*Communis rixa*" inſtead of *rixatrix* is error.

S. C. ante, 11. 173. 213. S. C. 1. Salk. 266. S. C. Holt, 274. S. C. Ld. Ray. 1094. 2. Keb. 687. 1. Mod. 71. 1. Salk. 382. 1. Hawk. P. C. ch. 75. ſ. 5.

Anonymous. Caſe 349.

COVENANT againſt huſband and wife upon a deed of demiſe to the wife *dum ſola*; whereby ſhe covenanted, that ſhe would every year, during the term, plant ſo many oak plants on the premiſes.

Covenant lies againſt huſband and wife upon a demiſe to her *dum ſola*, &c.

The breach aſſigned was, that *aliquos querculos aliquo anno durante termino annuatim*, they or either of them *non ſeruit ſeu plantavit*.

10. Mod. 163. 246. Stra. 229. 1094. 1272.

MONTAGUE objected, that the wife ought not to be joined in the action for a breach committed ſince the coverture.

Sed non allocatur: If the wife had aſſigned *dum ſola*, the action for a breach would lie againſt the huſband and her jointly: and as to the *annuatim aliquo anno*, at moſt it is but *ſurpluſage*, and ſhall be rejected.

JUDGMENT was given for the plaintiff.

The

Caſe 350.

* The Queen *againſt* Branworth.

An indictment will not lie at common law againſt *a hawker and pedlar* for being *a vagrant*. S. C. 3. Salk. 258. S C. Sett. & Rem. 222. S. C. Holt, 709. Ld. Ray. 790. 1360. 11. Mod. 3.

INDICTMENT by a jury of the town of *Portſmouth*, "for "that he, being an idle perſon, did wander in the ſaid town "ſelling of ſmall wares as a *petit chapman*."

To maintain this indictment it was urged, that a *petit chapman* is a vagabond by the ſtatute of 39. *Eliz.* c. 4.; and though ſome *petit chapmen*, that is, ſuch as are legally qualified by the ſtatute of 8. & 9. *Will.* 3. c. 25. may now lawfully uſe that occupation, yet that act excepts boroughs and corporations, ſo that as to them they remain *in ſtatu quo* (*a*).

HOLT, *Chief Juſtice*. Is a vagabond, *quatenus* ſuch, indictable? It ſeems not; for at common law a man might go where he would; but if he be *an idle and looſe perſon*, you may take him up as *a vagrant* (*b*), and bind him to his good behaviour by the common law; and by the ſtatute of Labourers (*c*) he may be compelled to ſerve. There is indeed a way by law of puniſhing *incorrigible rogues*, by burning them in the ſhoulder, and ſending them to THE GALLIES (*d*); from whence it may be urged, that there muſt be a way before of convicting them of being *rogues*, becauſe they cannot otherwiſe be puniſhed as *incorrigible rogues*; and therefore that conviction muſt firſt be by indictment.

But by HOLT, *Chief Juſtice*, No; but by being judged by a juſtice of peace to be *a vagrant*, and uſed by him as ſuch; and if he offend again, he may be indicted as *a common vagrant* (*e*).

Rule for quaſhing it was enlarged.

(*a*) See alſo the ſtatute 29. *Geo.* 3. c. 26. and the caſe of Rex *v.* Redferne, 4. Term Rep. 273.

(*b*) See the Vagrant Act 17. *Geo.* 2. c. 5.

(*c*)

(*d*) See Bracton, lib. 3. cap. 10. and 3. Inſt. 103.

(*e*) See Baillie's Caſe, Caſes Crown Law, 306.

Caſe 351.

Blackmore *againſt* Tidderly.

Trinity Term, 3. *Anne*, *Roll* 231.

To an action of aſſault and battery, A PLEA of "not guilty "within *ſix* "*years*" is bad on a *general demurrer*; for the 21. *Jac.* 1. c. 16. limits ſuch actions to *four years*. S. C. 1. Salk. 423. S C. 11. Mod. 38. S. C. 2. Ld. Ray. 1079. Poſt. 309. Carth. 3. 136. 144. 335. 471. Ld. Ray. 435.

TRESPASS, ASSAULT, AND BATTERY. The defendant pleaded NOT GUILTY *infra ſex annos*.

The plaintiff demurred to plea, as being argumentative; for the ſtatute 21. *Jac.* 1. c. 16. limits this action to *four years*, and not to *ſix years*. It is indeed an argument, that if it was not within ſix, it could not *à fortiori* be within four years; but pleadings ought to be direct, and not illative.

But PER CURIAM, You might well have joined iſſue with them upon this plea; for if they have taken a larger compaſs than they need, it is for your advantage. Upon this iſſue you might have given battery after four years, and within the ſix years, in evidence,

and

and it would have maintained your iſſue, and you could have judgment thereupon, it being found for the plaintiff, without the help of the *ſtatute of Jeofails*. So if the plea had been NOT GUILTY within *a week* or *a year*, and verdict for the plaintiff, he ſhould have judgment; for *guilty* or *not guilty* is the ſubſtance. BLACKMORE *againſt* TIDDERLY.

But in the *Hilary Term* following THE WHOLE COURT were of a contrary opinion. * [241]

* Anonymous. Caſe 352.

BY HOLT, *Chief Juſtice*. If a deviſe be made to the heir at law, paying ſuch and ſuch legacies, &c. and for default thereof remainder over, the heir until default is in by *diſcent*, and the other's intereſt is by way of *executory deviſe*: and ſo it was in the caſe of *Pell v. Brown* (*a*) in effect, where the fee was deviſed to one that was not heir, the remainder to him that was heir, there the heir was in by *deſcent* (*b*). It is hard to maintain, either by uſe or deviſe, a remainder to a ſtranger, after a preſent fee to one who is not heir at law.

On a deviſe to an *heir at law*, paying, &c. and for default thereof remainder over, &c. the heir, till default, is in by *deſcent*.

2. Atk. 290.
2. Bl. Com. 242.

(*a*) Cro. Jac. 590. 1 Eq. Abr. 187. Bridg. 1. 3. Palm. 131. 2. Roll. Rep. 196. 216. Godb 288.

(*b*) See Sole *v.* Gerard, Cro. Eliz. 525. S. C. Noy, 64. S. C. Moor, 422.; Dindant *v.* Burchet, Skin. 305.; Lamb *v.* Archer, Skin. 340.; Haynſworth *v.* Pretty, Cro. Eliz. 833. 919. NOTE *to former edition*.—But ſee Gilpin's Caſe, Cro. Car. 161.; Brittain *v.* Charnock, 2. Mod. 286.; Emerſon *v.* Inchbind, 2. Ld. Ray. 728.; Allen *v.* Heber, 2. Bl. Rep. 22. S. C. Stra. 1270.; Newton *v.* Bennett, 1. Bro. Caſ. in Ch. 135. and Powel on Deviſes, 433. 3. Com. Dig. "Deviſe" (K.)

Reignots *againſt* Tipping. Caſe 353.

BY THE COURT and all THE CLERKS. After a rule to ſign judgment, there ought to be *four days*, excluſive of the day on which the rule is made and the judgment ſigned. The meaning of the rule is, that the party may have reaſonable time to bring a writ of error, if he ſee occaſion; but in the common pleas they never give rules for the ſigning of judgment, but they ſtay until the *quarto die poſt*, which makes but four days incluſive.

Time of ſigning judgment.

Ante, 191.
2. Salk. 518.
1. Salk. 399.
Impey's Prac. 347.

Denham *againſt* Stevenſon. Caſe 354.

DEBT by an adminiſtrator againſt the heir upon a bond of his anceſtor; and declares *cui adminiſtratio omn. bonor. &c.* by ſuch a peculiar *debito modo commiſſa fuit*; without ſaying, that he had ordinary juriſdiction, or that it did of right belong to him to commit adminiſtration: and demurrer to the declaration.

In debt by an adminiſtrator upon a bond againſt an heir, he need not ſhew how the defendant is heir.

FIRST, It was excepted, that he had not ſhewn how the defendant was heir; and for the neceſſity of ſo doing was quoted the caſe of *Carver v. Haſelrig* (*d*).

S. C. 1. Salk. 355.
S. C. Holt. 45.
Ld. Ray. 562.
856.

But PER CURIAM, The diverſity is, that where he ſues as heir, there, becauſe he is preſumed conuſant of his *pedigree*, he ought to

(*a*) Hob. 251.

DENHAM *againſt* STEVENSON.

An adminiſtrator, in debt on bond againſt an heir, may declare generally that adminiſtration was *debito modo* committed to him by ſuch *a peculiar*, without ſhewing *the right* of the peculiar.

ſhew it; but not where he is ſued (*a*), becauſe ſtrangers ſhall not be compelled to ſhew what lies not in their knowledge.

SECOND EXCEPTION. He makes title by virtue of adminiſtration committed by *a peculiar*, without alledging any right in the peculiar to commit adminiſtration, and that is ſubſtance and traverſable; for *de communi jure* here in *England*, it belongs to THE ORDINARY (*b*).

It was urged, on the other ſide, that at moſt it was but matter of form, the omiſſion whereof is not to be objected upon a *general demurrer*; and upon iſſue the plaintiff would not be put to prove that the peculiar had right to grant adminiſtration.

* [242]

S. C. 1. Salk. 40.
1. Lev. 71.
3. Mod. 425.
Vide 1. Lutw. 8. 297, 298.
2. Mod. 65.
1. Sid. 90.
3. Lev. 211.
5. Mod. 425.
1. Sid. 228.
1. Lutw. 8. 297.
2. Mod. 65.
Cro. Eliz. 431. 791. 838. 879. 907.
1. Sal. 40, 42.
Carth. 148.
Ante, 134.

* HOLT, *Chief Juſtice*. It cannot be ſaid to be only form; for it is the committing of adminiſtration by one having legal authority which veſts the cauſe of action in the plaintiff, and by law *the ordinary* is to commit adminiſtration. In all caſes of *peculiars*, you muſt ſhew title and right to grant adminiſtration; and the leaſt averment that can do it, is to ſay, that *de jure* it did belong to him to grant adminiſtration; for the Court cannot take notice of peculiars, but may of biſhops; and *profert in Cur. literas adminiſtrat.* is not enough (*c*); for they only certify what is on the face of them, *viz.* that adminiſtration was committed to the plaintiff by ſuch a one; but that does not import he had any right to grant it.

POWELL, *Juſtice*. Might not the defendant have come and traverſed his having right to commit, if you had alledged it? In the caſe of *Chiverton v. Trudgeon* (*d*) it was doubted, whether the right of an archdeacon, who is taken notice of by us as *oculus epiſcopi*, ought not to be ſhewn. But all the matter is, Whether, as it is here ſaid *debito modo commiſſ. fuit*, that ſhall be taken only in reſpect to the legal form of the inſtrument, or to the peculiar's right of committing adminiſtration? And I rather believe the firſt, for *debito modo* ſeems to me not to be enough to traverſe; they might indeed have traverſed the adminiſtration committed, and given in evidence that he had no right to commit adminiſtration.

And no rule was given (*e*).

(*a*) See Roe on the demiſe of Thorne v. Lad and Others, 2. Bl. Rep. 1099.

(*b*) See 1. Sid. 228. 2. Vent. 84. Cro. Jac. 556. and the caſe of Gidley v. Williams, in the king's bench, 12. *Will.* 3. NOTE *to former editions.*

(*c*) See 4. *Anne*, c. 16.

(*d*) Cro. Jac. 556.

(*e*) This caſe was argued a ſecond time, and judgment given for the plaintiff; by HOLT, *Chief Juſtice*, GOULD and POWYS, *Juſtices*, that the declaration was good, and that the *debito modo* was a ſufficient averment, POWELL, *Juſtice*, being of a contrary opinion, S. C. 1. Salk. 40.—A writ of error was afterwards brought in the exchequer-chamber, where the judgment of the court of king's bench was affirmed by the whole Court, S. C. 1. Salk. 42.

Bignall

Bignall *againſt* Devniſh. Caſe 355.

PER CURIAM. If the defendant, upon *habeas corpus*, remove a cauſe from an inferior court, in which there ought to have been ſpecial bail below, he ſhall not thereby put the plaintiff in a worſe condition, but be compelled to give in bail above; but as to the ſum which the bail are to juſtify themſelves worth, that may be moderated as the Court ſees occaſion (*a*).

The ſame bail ſhall be given on removal by *habeas corpus* as was given in the inferior court.

1. Salk. 204. 2. Show. 421. 485. 1. Com. Dig. "Bail" (I). 1. Bac. Abr. 211. Ld. Ray. 603. 696.

(*a*) See 12. *Geo.* 1. c. 29.; the 19. *Geo.* 3. c. 70. Tidd's Pract. 179.

Anonymous. Caſe 356.

PER CURIAM. It is good cauſe of *new trial* where the Judge who tried the cauſe has denied to admit that for evidence which was legal evidence, or where he miſdirects the jury.

Miſdirection of the Judge, or refuſal to admit good evidence, are grounds for *new trial*. Ante, 22. 222.—Fareſt. 53. 64. 3. Salk. 649. Poſt. 307. 5. Com. Dig. "Pleader" (R. 17.).

Middleton *againſt* Haw. Caſe 357.

Hilary Term, 3. Anne, Roll

SCIRE FACIAS upon a judgment in an action on the caſe, and pleaded execution by *fieri facias* by judgment *pro debito et damnis*, which is different.

Variance.

Judgment for the plaintiff.

* The Queen *againſt* Rawlins. Caſe 358.

Hilary Term, 3. Anne, Roll

RAWLINS was bound by a recognizance to appear the firſt day of Term, at which time THE ATTORNEY GENERAL filed *an information* againſt him.

If a perſon be bound to appear in the king's bench on the firſt day of a Term, to anſwer all matters alledged againſt him, and the attorney general file an information againſt him on the ſame day, he ſhall have an *imparlance* until the enſuing Term.

He prayed an imparlance.

THE ATTORNEY GENERAL would have the imparlance to *craſtino Animarum*: for heretofore, when one came in upon a recognizance, or *habeas corpus*, they were put to plead *inſtanter* (*a*). Indeed, in *the Biſhop's Caſe* (*b*), by great advice, they pleaded, that they ought to have time to imparl, but it was ruled that they ſhould plead *inſtanter*. But that was thought hard, and is now redreſſed; but it was never intended to grant greater indulgence on the crown ſide than is granted on the plea ſide; where the courſe is, that if a declaration be delivered before *craſtino Animarum*, or *menſem Paſchæ*, the defendant ſhall not give a plea ſo as to try it that Term, but he muſt plead ſo as to enter.

S. C. 1. Salk. 367. S. C. 3. Salk. 185. 1. Lilly, 389.

HOLT, *Chief Juſtice*. If in a *Michaelmas Term* a *writ of ſummons* iſſue upon *an information*, and the defendant comes in

(*a*) (*b*) 3. Mod. 212. 4. St. Tr. 300.

THE QUEEN *against* RAWLINS.

voluntarily thereupon, there is reaſon that he ſhould have *an imparlance*; but yet not to another Term, becauſe, in that caſe, by due proceſs continued, he might be brought in upon *an attachment* the ſame Term, ſo as to be compellable to plead *inſtanter*; and where, upon ſtanding the length of proceſs, they muſt have pleaded the ſame Term, there is reaſon that, upon a voluntary appearance, they ſhould have ſo much time allowed to plead as they might have gained by running out the length of proceſs, and no more; but the information is now of this Term, and until information exhibited there cannot be *a ſummons*; the offence being in *Middleſex*, the ſummons indeed may be made returnable at any day certain. On the crown ſide the courſe is, whenever *an imparlance* has been that it was granted to another Term. An *imparlance* in theſe caſes cannot be without leave of the Court; and the reaſon of an imparlance is, that the defendant may have a reaſonable time to adviſe what to plead, and the Court are judges of that time. Heretofore there have been imparlances from one return of *Michaelmas Term* to another of that Term; but on the plea-ſide, we have now imparlances to a day certain in the ſame Term (*a*).

Yet, though THE COURT declared this very reaſonable, no rule was made.

(*a*) Of imparlance in appeals, &c. ſee 2. Hawk. chap 23. ſect 102. And note, where a cauſe is by original, it is ſaid an imparlance is *ex gratiâ Curiæ*. See Skinner, 2. NOTE *to the former edition.*

* [244]

Caſe 359.

* Arnote *againſt* Breame.

Eaſter Term, 3. Anne, Roll .

In debt on bond for performance of an award, it is not neceſſary to ſtate *the date of the award*; for if it be alledged to have been made on a day which is within the time of the ſubmiſſion, it is ſufficient.

S. C. 1. Salk. 76. 478. S. C. Holt, 212. S. C. 2. Ld. Ray. 1076. Ante, 231. 2. Salk. 425. 1. Lutw. 382, 386. Poſt. 311.

DEBT UPON BOND for the performance of an award, reciting ſeveral differences between the plaintiff and the defendant, concerning a piece of ground ſouth of the plaintiff's houſe, adjoining to the *River Thames*, and uſed as A WHARF, and the erecting ſeveral piles of boards and ſcaffolds thereupon to the nuiſance of the plaintiff's houſe; all within the liberties of *St. Bride's Hoſpital, London*. "No award" pleaded; and an award ſet forth, adjudging, that the defendant ſhould enjoy the ſaid piece of ground as A WHARF, and that the ſaid ſcaffolds ſhould be pulled down and removed.

On demurrer ſeveral exceptions were taken to this award.

It is not neceſſary to ſtate the date of award.

Kyd. 196.

FIRST, It does not appear what the date of it was; ſo it may be, that it was made without authority, as before the ſubmiſſion.

Sed non allocatur: for it is alledged to have been made on ſuch a day, which appears to be within the time; and if no date be ſet out, it ſhall be intended it had none, and then it is good from the delivery,

delivery, according to *Clayton's Caſe (a)*. Every writing or deed has a date in law, *viz.* the time of the delivery thereof; a deed may bear date on one day, and be delivered on another; and the day of delivery is the date, and the other the bearing date; and the making an award or deed is that which gives it the eſſence and being of a deed or award, and that is the date of it.

ARNOTT *againſt* BREAME.

SECONDLY, It was objected, that the ſubmiſſion was of ground, &c. within the liberty of the *Hoſpital of Bridewell*, and of ſcaffolds, &c. newly erected; and the piece of ground which is mentioned in the award is not averred to be within that *liberty*, nor to have been newly erected.

On a ſubmiſſion reſpecting ſcaffolds newly-erected within ſuch a liberty, an award made *de et ſuper præmiſſis*, is good, although it do not aver the ſcaffolds to be within *the liberty*, or to have been newly erected.—1. Salk. 70. Ante, 232.

SED PER CURIAM, The award is ſaid to be *de et ſuper præmiſſ.* and therefore it ſhall be intended within the ſubmiſſion, if the contrary be not ſhewn on the other ſide, which the defendant cannot now do after "*no award*" generally pleaded, for that would be a departure.

THIRDLY, It is not awarded who ſhall pull down the ſcaffold, therefore the award is not final or certain, and ſo far void; and this not to be helped by any averment or intendment of the Court (*b*). The diverſity is, that when a thing uncertain may in the nature of the thing be made good by averment or intendment, and when not; as if one covenant to give a bond or obligation for the enjoyment of land, there it muſt be to the value of the land; or if for payment of ſuch a ſum, it ſhall be in double the ſum (*c*): but in an award it is not ſo, for to admit of averment is to admit the matter not determined, ſince the averment would be traverſable, and to intend would be to make, not to expound an award. And it is not an anſwer to ſay, that it appears on the face of the award that the land was the defendant's, and therefore the nuiſance being thereupon ought to be removed by him who may come there without being a treſpaſſer; for * it does not neceſſarily appear that the ground was his; for the award is only, that he ſhall uſe it AS A WHARF, which rather ſhews, that it was diſputed whether it was his right before. Neither does it ſhew it to be his now; for the words only are, "that he ſhall uſe it as A WHARF;" that is, that he ſhall have the liberty of wharfage there; and if it be admitted to be his ground before (for if it were the ground of the plaintiff the erection of the boards could not be a nuiſance to his houſe), yet a nuiſance is by law abateable by him to whom it is a nuiſance; and if it were not, the arbitrators might, by ordering the plaintiff to pull it down, enable him to do it without danger of becoming a treſpaſſer thereby. So it being left indefinite, whether the plaintiff or the defendant ſhall pull it down, it is therefore void for uncertainty; and then this being aſſigned only for breach, though the award for other particulars were good, the plaintiff cannot recover, there appearing no cauſe of action on the whole record for him, according to *Turner's Caſe (d)*.

If *A.* erect ſcaffolds on his own ground, and thereby commit a *nuiſance* to *B.* and arbitrators award that the ſcaffolds ſhall be removed, the award is ſufficiently certain, though it do not ſay *by whom*; for it ſhall be intended by *A.* onwhoſe ground they are erected.

* [245]

2. Vent. 242. 1. Salk. 76. 2. Ld. Ray. 1076. Kyd, 134. 1. Bac. Abr. 143, 144. Poſt. 314. 9. Co. 54. 59.

(*a*) 5. Co. 70.
(*b*) Stiles, 365. 1 Roll. Abr. 164. 5. Co. 78. Cro. Eliz. 432. Moor, 39.
(*c*) Cro. Jac. 116.
(*d*) 8. Co. 132.

ARNOTE *againſt* BREAME.

HOLT, *Chief Juſtice*, ſeemed to be of this opinion.

But POWELL, POWYS, and GOULD, *Juſtices*, clearly *contra*: for when they declare it to be a nuiſance, and that it ſhould be removed, who ſhould remove it but he on whoſe ground it is? And though in point of law any perſon may remove what is to his nuiſance, yet in the caſe of an award, which is by judges of equity as well as law, it muſt be intended that it was to be done by the party on whoſe ground it was.

Judgment for the plaintiff.

HOLT, *Chief Juſtice, dubitante ut ſupra.*

Caſe 360.

Anonymous.

An action lies for certifying a wrong record. 3. Mod. 226.

PER CURIAM. Upon a writ of error, if the clerk below will certify the record wrong, an action on the caſe will lie againſt him for it; and if he make no return, the plaintiff may have a writ of *executione judicii* out of chancery.

Caſe 361.

The Queen *againſt* Sir Jacob Banks, Knt.

If an indictment be removed by the proſecutor into the king's bench by *certiorari* out of *London* or *Middleſex*, the defendant muſt enter into a recognizance to try it the ſame Term, or at the Sittings after; but if removed out of any other county he is without day, and if he do not appear proceſs ſhall iſſue till he be outlawed; but if the defendant remove an indictment, he muſt enter into a recognizance purſuant to 5. *Will. & Mary*, c. 2.

AN INDICTMENT was found againſt him at the quarter-ſeſſions of *Berkſhire*, for an aſſault upon *Mr. Culpeper*, in *Windſor Caſtle*.

The indictment was removed up by *certiorari* at the ſuit of the proſecutor. Both he and the defendant took out proceſſes, made up records, and took warrants of *niſi prius* to try it at the next *aſſizes* after removal. The proſecutor not thinking fit to carry it on, the defendant put in his record, and was tried and acquitted.

And now a *new trial* was moved for by the proſecutor; for that when an indictment is originally preferred here above, or found below, and removed up here by the proſecutor, the defendant cannot carry it down to trial until after a default in the proſecutor, nor even then without application to the Court, and leave had. It is ſo in the caſe of an information *qui tam*, becauſe, as the Book ſays (*a*), it *quodammodo* concerns the queen; *à fortiori* then will it be in the caſe of an indictment, which altogether concerns her.

* To which it was anſwered, that there is a great difference between *an indictment* and *an information*; for *an indictment*, being a charge by the oaths of twelve men, is much heavier; and a perſon ought to be allowed all imaginable ſpeed to clear himſelf of it, and not be continued under ſuch an imputation until the proſecutor thinks fit to bring it to a trial; but *an information* is a bare ſuggeſtion, and therefore is more eaſily reſted under.

* [246]

S. C. 2. Ld. Ray. 1082.
S. C. 1. Salk. 652.
S. C. 11. Mod. 33.
1. Salk. 380.

(*a*) Vide 2. Leon. 110.

ANOTHER

ANOTHER OBJECTION was made, that ſuch a courſe, if tolerated, would be of great miſchief, for then the moſt profligate offenders would get themſelves acquitted by ſurprize, or over-haſtening the trial, without allowing the queen convenient time to manage her proſecution.

In *indictments* and *informations*, neither the proſecutor nor the defendant can pray a *tales* without a warrant from THE ATTORNEY GENERAL.

It was anſwered, that there could be none, becauſe, in crown cauſes, there cannot be *niſi prius* or *tales*, without a warrant from THE ATTORNEY GENERAL, who will be ſure to grant none if he find any ſuch danger; and that ſuch a thing may be at leaſt by conſent appears by the caſe of *The King v. Jones* (*a*), and the granting a *niſi prius* amounts to a conſent.

Savil, 2. 1. Lev. 223. Bull. N. P. 305.

PER CURIAM. Before the late ſtatute of 5. & 6. *Will. & Mary*, c. 2. concerning removals by *certiorari*, if the defendant had removed an indictment from any county except *London* and *Middleſex*, he was *ſine die* out of court, and only to be brought in upon *proceſs*, whereupon he might have been *outlawed*; but in that caſe the defendant might have come in voluntarily if he pleaſed: but if the indictment had been removed from *London* or *Middleſex* by the defendant, there he muſt have entered into *a recognizance* to carry it down to trial the ſame Term, or the ſitting after (*b*); and in imitation of this practice in theſe two counties the late act was made, whereby the defendant, upon *certiorari* brought by him to remove an indictment out of any county in *England*, muſt enter into a recognizance to carry it down and try it at the next aſſizes, becauſe of the great delay of juſtice occaſioned by the other courſe; but if the proſecutor do remove it up, the defendant upon pleading does not enter into a recognizance to try it, and that begets the queſtion, Whether, notwithſtanding, he may immediately carry it down to trial?

1. Salk 380. 2. Hawk. P. C. ch. 27. ſ. 26. ſ. 47. 1. Burr. 21. 54. 3. Burr. 1462. 1. Bac. Abr. 353. 682.

And it was allowed here, that this being removed up by the proſecutor before plea, the defendant was out of court, and *ſine die*, and might be brought in by *proceſs* (*c*), or ſued to an *outlawry*, or if he pleaſed might come in voluntarily; and that if an indictment be found here, the defendant upon pleading ſhall give ſecurity to try it.

ET PER TOTAM CURIAM, after great conſideration, it was reſolved:

FIRST, That in civil actions the defendant cannot carry down a cauſe to trial by proviſo until after default in the plaintiff (*d*), except in ſpecial caſes where the defendant is in ſome reſpect in the nature of a plaintiff; as in *quare impedit*, in *replevin*, and in *prohibition*, to have a writ to the biſhop, return, or conſultation.

(*a*) 1. Keb. 195.
(*b*) 2. Hawk. P. C. ch. 27. ſ. 26.
(*c*) Staund. P. C. 70. 1. Salk. 61. 2. Hawk. P. C. ch. 27. ſ. 88.
(*d*) 2. Lev. 5. Pres. 215. 2. Hawk. P. C. ch. 41. ſ. 10.

No trial by *proviſo* in the king's caſe.

SECONDLY, * There cannot be A TRIAL *by proviſo* in the king's caſe, becauſe there can be no laches in the king.

May by conſent of proſecutor.

THIRDLY, A defendant may at the firſt inſtant, by conſent of the proſecutor, carry his cauſe to trial, where THE QUEEN is party.

Wheretrialmuſt be at bar, &c. 2. Hawk. P. C. ch. 42.

FOURTHLY, That all cauſes of the queen in this court muſt be tried at THE BAR, if MR. ATTORNEY will not grant a warrant of *niſi prius*.

A *niſi prius* is a conſent.

FIFTHLY, That that warrant in its nature is no more than a conſent that the cauſe may be tried in the country, but not that the defendant ſhall carry it down irregularly, or contrary to the uſual courſe.

Niſi prius ſuperſeded, if granted by ſurprize.

SIXTHLY, That if MR. ATTORNEY grant a *niſi prius* by ſurprize, and after ſhew that to the Court, they will ſuperſede it.

A defendant in criminal proceedings, in order to haſten trial, muſt apply to the Court.

SEVENTHLY, which was the main point in this caſe, that in all indictments or informations here, or indictments removed hither by the proſecutor for treaſon, felony, or any inferior offence, the defendant has no other way to haſten on his trial but by application to the Court; who, upon hearing the reaſons of MR. ATTORNEY, will, as they ſee occaſion, either give him further time, or fix him a day peremptorily for the trial, or give the defendant leave to bring it on himſelf.

And PER TOTAM CURIAM, A new trial was granted,

A defendant cannot carry a record down to trial without leave of the Court.

And THE COURT directed it for a rule hereafter, that a defendant ſhall never carry an indictment, removed hither by the proſecutor, to trial without leave of the Court.—Carth. 479. 507.

Caſe 362. French's Caſe.

Bail may detain their *principal* in *the Compter* in order to ſurrender him to the proper priſon in diſcharge of their recognizance, even though he be charged with a debt to THE CROWN, and the attorney general oppoſes the *habeas corpus*. S. C. 1. Salk. 353.

FRENCH had been arreſted at the ſuit of ſeveral perſons, and had given in bail. The bail having charged him with an action of four thouſand pounds had him taken up in *the City*, and committed to THE POULTRY COMPTER, in order to remove him by *habeas corpus*, and render in diſcharge of themſelves to the priſon of the king's bench, where the original actions were brought. It being *circuit-time*, and all the Judges out of town, before the bail could render him he was charged with the queen's debt. The bail having now brought a *habeas corpus* to remove him up, and render him,

THE ATTORNEY GENERAL oppoſed it, becauſe THE QUEEN, as he alledged, might chooſe her priſon, and THE COMPTER was ſafer than the marſhal's priſon; and he quoted the caſe of *Village v. Clayton* as a precedent for him.

Ante, 231. 1 Cro. 389. 2 Hyde, 127. 2 Com. Dig. "Bail" (A.). 2. Hawk. P. C. ch. 15. ſ. 4. Ld. Ray. 603. Stra. 641. 1217.

But

But PER CURIAM, If he had been taken up by THE QUEEN firſt, there might be ſome reaſon that they ſhould not for their own eaſe leſſen the queen's ſecurity of her priſoner, and that the queen's intereſt, concurring with that of the ſubject, ſhould be preferred; but on the other hand, the bail having taken him up here, THE QUEEN taking advantage thereof in charging him with her debt, ought not to prejudice them. FRENCH's CASE.

And he was turned over.

* Stillingfleet *againſt* Sir Harry Parker. Caſe 363.

AT A TRIAL AT BAR in ejectment the queſtion was upon the time of the commencement of a leaſe, which was to commence upon the determination of a leaſe, then in being, to *Queen Elizabeth*.

To prove a leaſe made to THE CROWN, a copy of the inrollment of it muſt be produced. Ante, 225. 1. Salk. 285, 286, 287. 2. Salk. 690. Fareſt. 129. Ld. Ray. 730. 1292. Stra. 162.

To prove ſuch a leaſe to the queen, an *antient book*, in which were entries of leaſes of the premiſes ever ſince *Henry the Seventh's* time, and which was found among the evidences of the biſhops (this being biſhop's land) was offered in evidence.

It was oppoſed, becauſe it is not ſuch good evidence as they might have had, for this being a leaſe made to *the queen* muſt have been inrolled, and ſo they might have brought a copy of the inrollment.

It was anſwered, that to prove the leaſe a good leaſe it would be neceſſary to produce a copy of the inrollment (*a*), becauſe, without inrollment, *the queen* could not take; but that to prove a leaſe in fact this ancient book is good evidence, and that was what it was offered for.

Yet BY THE COURT, Inrollment is better evidence of a leaſe in fact than the book; and therefore it muſt be produced (*b*).

(*a*) By the ſtatute 10. *Anne*, c. 18. "Where in any pleading any ſuch indenture of bargain and ſale as is required "to be inrolled by the 27. *Hen.* 8. c. 16. "ſhall be pleaded with a *profert*, the "perſons ſo pleading may produce, to anſwer ſuch *profert*, as well againſt THE "CROWN as againſt any other perſon, a "copy of the inrollment of ſuch bargain "and ſale; and ſuch copy, examined "with the inrollment, and ſigned by the "proper officer having the cuſtody of ſuch "inrollment, and proved on oath to be "a true copy ſo examined and ſigned, "ſhall be of the ſame force and effect as "the ſaid indenture of bargain and ſale "were and ſhould be of, if the ſame "were in ſuch caſe produced and ſhewn.

(*b*) See the caſe Vickery *v.* Farthing, Cro. Eliz. 411. S. C. Moor, 452. Langham *v.* Laurance, Hardres, 180. Thurle *v.* Maddiſon, Stiles, 462. Eden *v.* Chalkhill, 1. Keb. 117. Holcroft *v.* Smith, 2. Freem. 259. Kirby *v.* Gibbes, 2. Keb. 294.

Anonymous. Caſe 364.

PER CURIAM. The queen cannot be tenant at will. The queen cannot be tenant at will.

4 Com. Dig. "Eſtates" (H. 2.).

Burkmire

Caſe 365.

Burkmire *againſt* Darnell.

Eaſter Term, 3. Anne, Roll 64.

If *A.* is about to hire a horſe from *B.* and *C.* (in order to encourage *B.* to lend the horſe) ſay to him, "*Let A. have the horſe, and I undertake that he ſhall re-deliver it to you ſafely*," this is a *collateral promiſe* within 29. *Car.* 2. c. 3. and *void*, it not being in *writing*.

S. C. 1. Salk. 27.
S. C. 3. Salk 15.
S. C. Holt, 666.
1. Salk. 280.
Skin. 326.
1. Bac. Abr. 75, 76.
2. Ld. Ray. 1085.
12. Mod. 250.

AN ACTION ON THE CASE. The declaration ſtated, that in conſideration that the plaintiff, at the requeſt of the defendant, would let a certain gelding of his out to hire to *J. S.* the defendant undertook that the ſaid *J. S.* would re-deliver it to the plaintiff; that he accordingly did let him out his gelding; but that *J. S.* never re-delivered him.

At the trial it appeared upon evidence, that *J. S.* came to the plaintiff to hire a horſe from him; that the plaintiff, miſtruſting, was unwilling to let him have his horſe; and that thereupon the defendant came and deſired him to let him have it, and ſaid that he would undertake that *J. S.* ſhould re-deliver him ſafe.

THE CHIEF JUSTICE, doubting whether this promiſe was not void by the *ſtatute of Frauds (a) and Perjury*, it being not reduced into writing, directed a verdict for the plaintiff, but ſaved them the matter to be taken advantage of above.

DARNELL, *Serjeant*, now argued, that it was void by the ſtatute 29. *Car.* 2. c. 3. If the words had been, "*Let him have the horſe, and if he do not re-deliver him I will*," that had been plainly within the ſtatute, for it is anſwering againſt the default of another; and the undertaking here is the ſame in ſubſtance, for it is, that he ſhall do that which by law he was bound to do, and that is anſwering for the default of another. Indeed, if the whole credit and reliance had been upon the defendant's account, ſo as the plaintiff could have no remedy againſt *J. S.* for the non-delivery, it had been otherwiſe. And * he quoted a caſe in the ſecond year of the late king and queen, where it was reſolved upon this difference, that where the plaintiff has an action againſt the party for whom the undertaking is, no action will lie againſt the undertaker, without the promiſe be in writing; but not where no action lies againſt the party, for then the whole credit is entirely upon account of the undertaker, and the other is looked upon as his ſervant, and the ſale and contract, in judgment of law, are to the undertaker, though the delivery be to the other party as his ſervant: as if *A.* come to *B.* and tell him, "*Hire your horſe to J. S. and I will ſee you paid the hire*," there the hiring is to *A.* and not *J. S.* who is conſidered as a ſervant to *A.*

* [249]

RAYMOND *contra*. I agree the difference taken by MR. SERJEANT, but will make a quite contrary inference from it; ſo the point between us muſt depend upon the fact of the agreement, and yet I would diſtinguiſh upon the ſaid diverſity. It is ſaid, that where an action lies againſt the party, it will not lie upon a *paral promiſe* againſt the undertaker; and that is true, where an action lies againſt him upon the original contract or agreement;

(a) 29. *Car.* 2. c. 3.

but

but where an action lies against him upon a matter collateral to the contract, I deny the rule. The words of the statute shew, that the undertaking made void is an undertaking for the party's performing the original contract: and here, upon the original contract, no action would lie against *J. S.* for not delivering back the horse; though indeed if he refuse to do it upon request *detinue* or *trover* will lie against him, not upon *the contract*, but upon the subsequent *tort* of keeping that from us which of right we ought to have, and which belongs to us.

BURRMIRE *against* DARNELL.

CURIA. Clearly the words "default of another," in the statute 29. *Car.* 2. c. 3. is the default of another in performing his contract; and if the whole credit be not entirely given to the undertaker, so as no remedy lies against the party upon the contract, but that the undertaker comes in aid of the credit given by the contract to the party, the undertaking will be within the statute. The Court also agreed the case put by DARNELL, *Serjeant*; and further said, that if two persons go to a draper, and one of them says, "*Let this* "*person have so much cloth, and I'll see you paid*," there the sale is to the undertaker only, though the delivery be to another by his appointment; but if the contract be made with *A.* and the vendor scruple to let the goods go without money, and *B.* come to him and desire him to let *A.* have the goods, and undertake that *A.* shall pay him, that will be a promise within the statute. So the whole question will be, Whether the plaintiff had any remedy upon the contract against *J. S.*

And DARNELL, *Serjeant*, insisted on it, that there is a remedy upon the bailment against *J. S.* by contract in law.

* But by HOLT, *Chief Justice*, and POWELL, *Justice*, There is no such thing as *a contract* or *promise in law*, though there be such expression in some books. * [250]

At another day THEY DECLARED, that, upon a conference with the other Judges, they had had great debate, and variety of opinions on this case, and that many thought it out of the statute; for this reason, that the horse was let out wholly upon the credit of the defendant that it should be re-delivered. But WE (says he) of this court ARE UNANIMOUSLY AGREED, that it is within the statute; for it is an undertaking for the act, and to make good the default of another. It has been objected, that, if the party did not re-deliver him, the plaintiff had no remedy against him upon the *contract*, except only in *trover* and *conversion* upon the subsequent *tort* in case of demand and refusal, and that therefore they did not think him within the meaning of the statute, because it is a remedy accruing from a wrong after the contract; but there is a way to charge him upon the original delivery or bailment, for the bailment is such as in its nature required a re-delivery, and if the bailee will not re-deliver the thing bailed, the proper and only adequate remedy is an action of *detinue* against the bailee. Therefore this promise of the defendant's, that *J. S.* should re-deliver the horse bailed,

BURRMIER *against* DARNELL.

bailed, for which there lies a remedy againſt the ſaid *J. S.* upon the bailment is *a collateral promiſe*, and therefore a promiſe to anſwer for the act and default of another, and by conſequence within the ſtatute. So if two come to a ſhop, and one of them contract for goods, and the ſeller do not care for truſting him, whereupon the other ſays, "*Let him have them, and I will under-take he ſhall pay you*," that is an undertaking for the act and default of another, and within the ſtatute. But if the promiſe be, "*I will ſee you paid*," or "*I will be your paymaſter*," it is otherwiſe.

And, by THE WHOLE COURT, the verdict was ſet aſide (*a*).

(*a*) See Jones *v.* Cooper, where a parol promiſe made *before delivery* of the goods, "I will pay you if he do not," is held a collateral promiſe within 29. *Car.* 2. c. 3. Cowp. 227.

Caſe 366. Davy *againſt* Salter.

If a writ of enquiry be returnable *Tres Trinitatis*, which is on a *Sunday*, and is returned to have been executed on the ſucceeding day, *Monday*, the judgment founded thereon is erroneous: and the Court will take notice of this defect judicially, although there be no writ of error, or although it be not aſſigned for error on the record; for the Judges are bound to take notice of the commencement and return days of all the Terms.

ERROR from the court of common pleas on a judgment by default there.

The error inſiſted on was, that the *writ of enquiry* was executed after it was returnable.

The writ was returnable "*in Tres Sept. Trin.*" which is *a Sunday* of neceſſity, and was in that year on the *thirteenth June*, and it was returned to have been executed on the *fourteenth* of *June*, which is the day after, when the ſheriff's authority by the writ was determined.

The Court muſt take judicial notice of the commencements and return-days of all Terms, as well fixed as moveable, and this they cannot do without likewiſe taking notice of the days of the month on which theſe days fall. You muſt take notice of the commencement of *Eaſter Term*, which muſt be by taking notice of *Eaſter-Day*, on which it depends. * *Eaſter-Day* is the firſt *Sunday* after the full moon next after the twenty-firſt of *March*; and if that full moon happen on *a Sunday*, *Eaſter* ſhall not be until the *Sunday* after. By the ſame reaſon you will take notice of *Trinity Term*, its beginning and returns, and that *Tres Sept. Trinitatis* muſt be on *Sunday*, and what day of the month that *Sunday* is, and you will find it on the *thirteenth* of *June* this year, of which this judgment is: and *Gage's Caſe*, as in *Co. Ent.* 252. *Mod.* 402. 1. *Roll.* 595. were quoted, and ſtrongly relied on.

* [251]

EYRE *contra*. The Court cannot take notice of the day of the month. It is held (*a*), that the Court ſhall not take notice even of

S. C. 2. Salk. 626.
S. C. 3. Salk. 346. Ante, 148. 159. 196. Cro. Car. 53. 1. Roll. Abr. 29. 2. Jones, 228. 6. Com. Dig. "Return" (C. 1.). Sellon's Practice, 13. 1. H. Bl. Rep. 628. 1. Danv. 683. 2. Danv. 254. Farſt. 17. Ld. Ray. 4. 281. 870. 1142. 1557.

(*a*) 1. Cro. 275. Jones, 300. 3. Roll Abr. 595. Yelv 140.

fixed

fixed feaſts. He urged, that *Tres Trin.* in law is not a day of return, or at leaſt that *the Sunday* being not a *dies juridicus* ſhould not be reckoned, and it then would be well, for a writ may be executed on the day of its return; and for this reaſon *the eſſoins* are kept on the *Monday*: and the reaſon ſeems to be, that when *Sunday* is no legal day, the *Monday* ſhall ſucceed in its place; and in the common pleas they always take the *Monday* to be *in menſem Paſchæ*. If *the miſe* be joined on the *mere right*, where the appearance muſt be on the firſt day, it muſt be, that the *Monday* is the firſt day, or elſe the party could not ſave himſelf. This ſeems conſonant to reaſon, and the firſt inſtitution of the thing; for it would be abſurd to appoint a day for appearance which the party could not poſſibly appear at, and *Sunday* never was a juridical day (*a*). This is the more reaſonable, becauſe the firſt return is *Craſt. Trin.*; and in *Cro Jac.* (*b*), the *Monday* is ſaid to be the day of *Tres Trinitatis*; and the ſame in *Cro. Car.* (*c*), *viz.* that the *dies Lunæ* is the day of *Tres Trinitatis*; and all returns of writs adjourned to that day. It is objected, that the *Sunday* is always reckoned in the computation of the *quarto die poſt*; and the *firſt* and *fourth* day are taken in incluſive. But I anſwer, that all *the octaves* and *quindenas* are not incluſive of the firſt and *eighth*, or fifteenth; as in *Eaſter Term*, *quindena Paſchæ* does not take in *Eaſter-Day*, but is excluſive of it; and ſo is *octabis Trinitatis* of *Trinity Sunday*, as is apparent from *the entries*, which are, "*à die* "*Paſchæ in quind. dies*," "*à die Trin. in oct. dies*;" and "*à*" is always excluſive of the *terminus à quo*; and it is very odd to include the day of return in one of the four days of the *quarto die poſt*; for *poſt* is likewiſe excluſive (*d*). Then all judgments muſt refer to the firſt day of Term; and if ſo, this judgment muſt relate to *a Sunday*, except it be agreed that *Monday* ſhall ſucceed in its place. If a *ſcire facias* be returnable in the common pleas *Tres Trinitatis*, the entry is, *et modo ad hunc diem* SCILICET *diem Lunæ*; for if it be underſtood *Sunday*, it will be void.

DAVY *againſt* SALTER.

Carthew, 504.

HOLT, *Chief Juſtice*. If the *Sunday* happen to be the *quarto die poſt*, it muſt of neceſſity go to the *Monday*, becauſe it cannot be kept on the *Sunday*; and ſo of *eſſoins*; but all *quindenas* and *octaves* are incluſive of the *firſt* and *eighth*, or *fifteenth* day: ſo *octab. Hillarii* is the twentieth * of *January*, and *Hilary Day* is the *thirteenth*; and here, where we proceed *de die in diem*, we never enter "*à die S. Trin. in octo*," or "*quind. dies*," but "*die Lunæ, &c. poſt feſtum.*" As to the relation of judgments, that is for neceſſity to the firſt juridical day, which is *Monday*, *Sunday* being none. THE CALENDAR is ſettled by law, and is part of the law (*e*), and the moveable Feaſts by THE CALENDAR, though not altogether according to the rule in it. If a writ be returnable *quind. Paſchæ*, we muſt ſurely take notice of it (*f*), and ſo muſt all thoſe whom it concerns. Suppoſe upon forfeiture of

* [252]

(*a*) Britton, c. 5.
(*b*) Cro. Jac. 16.
(*c*) Cro. Car. 11.
(*d*) See Makepeace *v.* Dillon, Fort. 363.
(*e*) Cro. Eliz. 227. 1. Leon. 328.
(*f*) See ante, 41. 86. 160. 196.

iſſues,

Case 368.

Tilſden *againſt* Parfriman.

If a priſoner in cuſtody of the marſhal on *meſne proceſs* eſcape, and being retaken on an *eſcape warrant* under 1. *Anne*, c. 6. is committed to *Newgate*, and diſcharged therefrom on his entering into an agreement with, by the conſent of, his creditor, he cannot be re-taken on a ſecond eſcape warrant for not performing his agreement, or detained on his being afterwards in the cuſtody of the marſhal at the ſuit of another creditor.

TILSDEN being now in *Newgate* upon the warrant of a Judge, upon the ſtatute 1. *Anne*, c. 6. *(a)* againſt priſoners eſcaping; and the regularity of that matter being now referred to MR. CLERKE to examine,

It was reported to him, that *Tilſden* had been indebted to *Parfriman*, and in priſon of THE MARSHAL at his ſuit, and had eſcaped, and being taken up by a warrant, lay in *Newgate*; that afterwards *Parfriman* and he came to an agreement, whereupon, upon payment of a ſum certain in hand, and a promiſe to make other payments hereafter, he conſented to have him diſcharged out of *Newgate*; that afterwards *Tilſden* not performing his agreement, *Parfriman* endeavoured to get him arreſted, but could not; that he was arreſted at the ſuit of another, and committed to THE MARSHAL, who let him eſcape voluntarily; that afterwards he paid that plaintiff, but had no legal diſcharge from him; that *Parfriman* hearing of the new arreſt went to THE MARSHAL, and aſked him, If he had ſuch an one in his cuſtody? who anſwered, "*Yes*;" that he thereupon entered an action againſt him in the book that is kept in THE KING'S BENCH OFFICE, and afterwards got him arreſted by proceſs of * the court of king's bench, and kept him in cuſtody thereupon until he got a Judge's warrant, whereby he was carried to *Newgate*.

The commitment by this *warrant* was what was complained of.

* [254]

S. C. 1. Salk. 213. 345. S. C. 3. Salk. 150. Ante, 21. 63. 95. 154. Tidd, 193. Stra 410. 423. 3. Com. Dig. "Eſcape" (E.)

DARNELL, *Serjeant*. The diſcharge out of *Newgate* is no diſcharge of the firſt action for the eſcape on which he was committed to *Newgate*; for the plaintiff, upon the eſcape out of the cuſtody of THE MARSHAL, had his election to take the party upon a new action, or upon a warrant under the late act, or to have an action of eſcape againſt THE MARSHAL, and the taking up upon a warrant will be no diſcharge to THE MARSHAL; therefore the firſt action remains ſtill undiſcharged, and THE MARSHAL may take him up thereupon; and if ſo, he is now wrongfully at large, and may be taken up by a Judge's warrant, as has been done.

Ante, 95. 154. 5. Mod. 232. 413.

But PER CURIAM, If one in cuſtody of THE MARSHAL eſcape, and is taken upon a Judge's warrant, that is no new impriſonment, but a continuance of the old; and a diſcharge of that commitment will be a diſcharge of the firſt; but if he had eſcaped out of the county jail without the conſent of the jailor, there the marſhal might retake him: as if one be in cuſtody of the marſhal for debt, and eſcape, and after the ſame plaintiff takes him up upon another debt, and lets him go again, yet the marſhal may retake him for the eſcape.

(*a*) See ante, 154.

THE

THE COURT agreed, that if a man be in cuſtody two Terms without a declaration, he ſhall be diſcharged upon filing common bail.

Priſoner, how to be diſcharged, if no declaration in two Terms.

2. Salk. 213, 214. 3. Salk. 150.

And the way to charge one in cuſtody in *Term-time* is by filing a bill againſt him, and delivering a declaration to the turnkey: after which he muſt lie two Terms, as to that party, before he can be diſcharged on common bail.

The way to charge a priſoner with an action in *Term-time* and in *Vacation*.

But in *Vacation*, there is no way but to make an entry in the book that is kept in the office of a *remanet in cuſtodiâ mareſchalli ad ſect. de, &c.* and that is ſufficient to charge him; but to make that ſuffice, the party muſt be actually in jail, and not eſcaped; for the reaſon why ſuch entry is allowed good is, becauſe of the neceſſity of the thing, the party having no other way to charge him when he is in actual cuſtody (*a*).

Tidd. 196.

But upon an eſcape there is not that neceſſity, for he being at large may be arreſted. Indeed, if the marſhal will own a perſon to be in his cuſtody who is not ſo, that ſhall conclude him, and ſubject him to an eſcape; but ſuch confeſſion of the marſhal ought not to be concluſive to any but himſelf; and it is againſt a principle of the law to charge a man in cuſtody who is not in cuſtody; and the miſchief of it would be very great. And this cannot be called taking advantage of the party's own wrong; for his eſcaping out of priſon, where he is in cuſtody at the ſuit of *A.* cannot be any wrong to *B.* though he be thereby deprived of the advantage of charging him in cuſtody.

Time for declaring on a recaption. Ante, 21.

Indeed, if the marſhal ſuffer one to be in and out at times, and during ſuch time he is charged by a *remanet, &c.* though he were actually out of priſon at that time, yet if he returned in again, that will be *quaſi* a continuance of the firſt impriſonment; and by ſuch return he may have notice of the charge: and the meaning of the ſtatute whereby * the marſhal is to acknowledge what priſoners he has, is only in order to charge himſelf.

See Jaques v. Wilkinſon, 3. Term Rep. 392.

* [255]

And PER CURIAM, The ſecond impriſonment in NEWGATE is irregular; but we cannot take notice of any thing until the warrant be returned: and the queſtion will be, Whether we will relieve on motion, or put you to your *audita querela*?

(*a*) The method by which a priſoner may be charged in cuſtody with *a new ſuit* in *Vacation-time* underwent great conſideration in the caſe of Hutchins *v.* Kenrick, Trinity Term, 33. *Geo.* 2. and LORD MANSFIELD delivered the reſolution of the Court upon this point to the following effect: "We have conſidered "the practice of this Court, and of that "of the common pleas, and we are of "opinion, that the right method is (like "that which is taken in the common "pleas) to *file a bill* as of the *preceding* "*Term*; and then to deliver or to leave "for the defendant, being in cuſtody, a "*copy of the declaration* as of the preced- "ing Term; and to make an *affidavit* "thereof: and there is no occaſion for a "*habeas corpus*." But ſee Rule Eaſter Term, 15. *Geo.* 3. "No declaration ſhall "be ſufficient to detain ſuch priſoner, "unleſs affidavit that the cauſe of action "amounts to ten pounds or upwards be "firſt made and filed with the clerk of "the rules, and the ſum ſpecified in ſuch "affidavit indorſed in the declaration "before it is left with the turnkey."

Case 369. The Queen *against* Saintiff.

An indictment for not repairing "a *common bridge* "situated in a "certain "common *foot-*"*path*," is good, without ſtating, that it was in the *king's highway*: but the ſeſſions have no power, by 22. *Hen.* 8. c. 5. with reſpect to *private bridges* not common in the highways, unleſs they are *public nuiſances*, and then they have juriſdiction by 1. *Edw.* 3. c. 16.

S. C. 1. Salk. 359. S. C. Holt, 129. S. C. 2. Ld. Ray. 1174. Ante, 150. 191. Poſt. 263. 307. Ld. Ray. 725. 792. 804. 856. 1275. 1249. 12. Mod. 13. 398. 409.

AN INDICTMENT againſt him for not repairing *quendam communem pontem ſitum in quâdam communi ſemitâ pedeſtri*, leading from ſuch a place to ſuch a place, which he was bound to repair *ratione tenuræ* (*a*), and which he ſuffered to be *valde ruinoſ. et in magno decaſu, &c. ad commune nocumentum omn. ligeor. domine reginæ illac tranſeun.* and judgment given thereupon at the quarter-ſeſſions, of which error was now brought.

EYRE now objected to the indictment, that it did not lie; for it did not appear that the bridge was in *altâ regiâ viâ*, as it ought to have been *per lui*: for it was a term of art not to be ſupplied by any other words, no more than the words "*murdravit*," "*burgla-*"*riter, &c.*" in indictments of murder or burglary (*b*). Then if it do not appear to be *a highway*, it muſt be taken to be only *a private way*, for the not repairing whereof an indictment does not lie.

Of the other ſide, in maintenance of the judgment, was quoted *Weſt's Precedents*, 147. 156. 346.

EYRE further urged, that the power given to juſtices of peace in this caſe is by the ſtatute of 22. *Hen.* 8. c. 5. which mentions, that they ſhall judge of decay in bridges in highways; therefore they ought to ſhew that this is ſuch a bridge, and ſo purſue their authority (*c*).

HOLT, *Chief Juſtice*. An indictment lies not for not repairing *a bridge*, except it be in *a highway*, as MR. EYRE will have it; but the word "highway" is *the genus* of all public ways, as well cart, horſe, and foot ways, and yet an indictment lies for any one of theſe ways, if they be common to all the queen's ſubjects having occaſion to paſs there; that is, if it be *a foot-way* only common to them all, or a *horſe-way* and a *prime-way*; and theſe are not *altæ regiæ viæ*, for that is the great highway common to cart, horſe, and foot, that pleaſe to uſe it: ſo that the term of *alta regia via* is not ſo neceſſary; and if there be a common foot-way for all the queen's ſubjects, if it be in decay, an indictment muſt of neceſſity lie for it, becauſe an action on the caſe will not lie without a ſpecial damage.

Then as to the authority of the juſtices, they have a power by the ſtatute of 1. *Edw.* 3. c. 16. by which they are created, to inquire of all public nuiſances; and if this be a public bridge, * [256] * the ſuffering of it to be in decay is a public nuiſance, and ſo within their juriſdiction.

So all that ſticks with me is the manner of laying it; for the word *commune* does not *ex vi termini* import, that it is common to

(*a*) See 1. Hawk. P. C. ch. 76. ſ. 8. 450. 4. Mod. 61. 2. Vent. 208. Palm. 389. ſ. 14.

(*b*) Stamford's P. C. 98. 2. Inſt. 701. Dyer, 304. 4. Co. 39. 1. Hale, P. C. ch. 77. ſ. 24.

(*c*) 2. Inſt. 702. 1. Salk. 359. 2. Hawk.

all

all the queen's ſubjects, as it ought to do to maintain an indictment: And one of the precedents produced has the word "*publicus*," which is of wider extent than "*communis*," for there is common for two, three, or more; and it will be hard to underſtand the word "common" to be univerſal, to charge a man's freehold. And without doubt the concluſion will not help it, if ſo much be not expreſsly charged in the premiſes. And here it is not ſaid to whom it is common. It is, therefore, very fit to ſee precedents before we determine it (*a*).

THE QUEEN *againſt* SAINTIFF.

Vide Fleta, 174. Auſow. Pop. 86.

(*a*) It is ſaid, S. C. 2. Ld. Ray. 1175. that the exception to *communis ſemita* was over-ruled; and that the indictment was, in this reſpect, held well enough, on the authority of *Rex v. Thrower*, 1. *Vent.* 208. but they held the indictment naught, becauſe it was *pons pedalis* inſtead of *pedeſtris*, S. C. 1. Salk. 360.

Trevivan *againſt* Lawrence and Others. Caſe 370.

Paſter and Michaelmas Term, 3. Anne, Roll 221.

IN EJECTMENT, by an adminiſtrator, of lands in *Cornwall*, this ſpecial verdict was found:

That one *Stephen Robins* was ſeiſed of the premiſes in fee; that, he being ſo ſeiſed, the plaintiff's inteſtate ſued him in debt upon a bond in ſuch a court in *Weſtminſter*; that in that ſuit judgment was given againſt the ſaid *Stephen Robins*, in *Michaelmas Term* 1656; that in the thirteenth year of the late king a *ſcire facias* was brought by the now plaintiff againſt the now defendant, as *terre-tenant* of ſome of the lands whereof the ſaid *Stephen Robins* was ſeiſed at that time or ſince; and that the defendant being ſummoned appeared, and pleaded "*nul tiel record*;" and day was given to produce the record; at which day a judgment of *Michaelmas Term* was produced, and judgment and award of execution for the plaintiff thereupon; but that the *ſcire facias* brought by the plaintiff recited a judgment of *Trinity Term* 1656. And upon this award of execution an *elegit* was taken out by the plaintiff, and the lands extended, and in ejectment to get the poſſeſſion the judgment given in evidence was that of *Michaelmas* 1656. And for *the variance* between the recited judgment in the *ſcire facias*, and that given in evidence; the jury doubted:

Judgment is obtained in debt on bond in *Michaelmas Term*. A *ſcire facias* is brought thereon againſt the *terre-tenants* returned, and, on "*nul tiel record*" pleaded, judgment is given for the plaintiff, and an *elegit* ſued out. An ejectment is brought upon the *elegit*; and it is found by ſpecial verdict, that the *ſcire facias* recited a judgment of *Trinity Term*. This, if diſcovered on the trial of the iſſue of "*nul tiel record*," muſt have prevailed as a *failure of record*; but the fact having been judicially tried and aſcertained, the *terre-tenants returned* are eſtopped, by the

EYRE *for the plaintiff.* I agree the general rule, that whoever makes title under an *execution* muſt ſhew *a judgment* on which it is grounded; but here we need only to ſhew the judgment on the *ſcire facias*; for though it be upon *a judicial writ*, yet it is conſidered as *an action*, and may be releaſed by that name (*a*). If judgment be againſt one, the attorney for the plaintiff may ſue execution by virtue of his firſt warrant, yet a warrant in the original cauſe does not impower an attorney to appear to a

award of execution on the judgment in the *ſcire facias*, from taking advantage of this *variance*; and ſo are the *terre-tenants not returned*, if they do not ſhew a *title paramount* to the judgment in the *ſcire facias*.—S. C. 1. Salk. 276. S. C. 3. Salk. 151. S. C. Holt, 282. S. C. 2. Ld. Ray. 1036. 1048. Ante, 134. Poſt. 384. 2. Keb. 47. 55. 181. 415. 3. Keb. 212. 768. 3. Lev. 300. 1. Saund. 37. 2. Lut. 1267.

(*a*) Litt. ſect. 503, 504.—See alſo 1. Wilſ. 99. 2. Wilſ. 251. 2. Black. Rep. 1227. 1. Term Rep. 46. 208.

TREVIVAN *against* LAWRENCE AND OTHERS.

ſcire facias upon a judgment in that cauſe, or the attorney for plaintiff to ſue out a *ſcire facias* (*a*). A releaſe of an action is a releaſe of a *ſcire facias*, but a releaſe of an action is no releaſe of execution; therefore the *ſcire facias* is no execution, nor the judgment upon it more than a bare award of execution.

*[257] * BROTHERICK *contra.* A judgment on a *ſcire facias* is no new judgment to affect the land in this caſe, but is only an application of an ancient lien on the land (*b*). And this judgment does not alter the nature of the duty, nor create a new one (*c*). Indeed, an officer who juſtifies by virtue of a writ need not ſhew a judgment, but the party muſt always do it (*d*). And by him, a *ſcire facias* lies not upon a judgment on a *ſcire facias*.

HOLT, *Chief Juſtice.* If a *ſcire facias* recite a judgment of *Trinity Term* in debt, whereby all the defendant's lands whereof he was then, or at any time ſince, ſeiſed, are bound, and the tenants returned plead "*nul tiel record*," and a judgment of *Michaelmas Term* be produced, no doubt that is a *failure of record.* But the queſtion is, when the record is produced, and judgment thereupon, Whether the defendants are not thereby concluded for ever? for to admit them to controvert it now would be to falſify the point tried, and that cannot be even by an iſſue in tail: as if, in a writ of entry, a recovery be againſt the anceſtor of the iſſue in tail, the iſſue cannot falſify it in the point tried, but he may ſay that his anceſtor omitted the giving ſuch things in evidence which he can now give. And one may have a *ſcire facias* upon a judgment on a *ſcire facias*; and for this he remembered the caſe of *Obrien v. Ram* about fifteen years ago in this court (*e*). A judgment againſt a *feme ſole*, who afterwards took huſband before execution, and then a *ſcire facias* was ſued againſt both, and judgment thereupon, and an award of execution againſt both, and then the wife died, and then a new *ſcire facias* is brought againſt the huſband ſurvivor, and it was adjudged that it lay. And another caſe ſince likewiſe in this court (*f*): A *feme ſole* obtained a judgment, and before execution took huſband, and then they brought a *ſcire facias* to have execution, and had judgment thereupon, and award of execution; the wife died, and the huſband ſurviving had another *ſcire facias*, and it was held well. And he quoted the caſe of *Gilbert v. Bragg*, in the year 1655 (*g*): A judgment in debt was obtained againſt a tenant in tail, who died, and afterwards a *ſcire facias* was brought againſt his iſſue, who being returned "warned," made default; and though the lands in tail were not liable, yet he is concluded for ever: this is grounded on THE YEAR-BOOK of *Aſſizes* (*h*). A jury cannot find againſt an *eſtoppel* in a point tried; and ſo wherever there is *an eſtoppel* that affects the intereſt of the land, the jury

See Cro. Car. 250. 264.

(*a*) Titherley *v.* Welch, Cro. Eliz. 254.—See alſo 4. Bac. Abr. 409.
(*b*) 2. Keb. 499.
(*c*) See Micoe *v.* Morris, 3. Lev.
(*d*) Owen, 134. Bridgman, 72. Hetley, 150.—See alſo 3. Wilſ. 345. 376. 2. Black. Rep. 733. 868.
(*e*) 3. Mod. 188.
(*f*)
(*g*)
(*h*) 27. Aſſ. pl.

cannot

cannot find against it. It is true, if you come to ſpecial pleading, and it be reduced to a point in pleading, and the party then will not take advantage of it by relying thereupon, but will leave it at large, the jury is not eſtopped, but may find the truth. As ſuppoſe in this caſe the plaintiff had declared on a judgment in *Trinity Term* 1656, and the defendant had pleaded "*nul tiel record*," if he will join iſſue that there is ſuch a record, he is gone, becauſe the truth will be againſt him; but if he will ſay that there was a *ſcire facias* taken out againſt the defendant at ſuch a time, reciting ſuch a judgment as is now ſhewed in his declaration, and that the defendant pleaded "*nul tiel record*," and that was found againſt him the defendant, and conclude by relying on the eſtoppel, he is ſafe, and the defendant cannot offer any thing againſt it. * So if a demiſe be pleaded by indenture, and the other will ſay, "*Nil habuit in tenementis*," and the plaintiff will ſay, "*habuit in tenementis*," he thereby waives the matter of the *eſtoppel*, and leaves it at large, and the jury may find the truth; but if he had ſaid, that it being by deed under his hand and ſeal, he ought not to be admitted againſt his deed to aver that he had nothing, the truth could not be inquired into. But if the iſſue were upon "*nil debet*," where the point does not come in pleading, as in debt for rent where the demiſe is by deed, the party cannot give evidence of *nihil habet in tenementis*, nor the jury inquire of it: and when an *eſtoppel* runs upon the land it alters the intereſt of it; for if a man by deed indented make a leaſe of *Dale*, reſerving rent, in which at that time he has nothing, and afterwards he purchaſes *Dale*, and bargains and ſells it to a ſtranger, the bargainee ſhall hold it liable to the firſt leaſe, and, coming under him who made the leaſe, ſhall be eſtopped to ſay, that the bargainor had nothing to let in the premiſes at the time of the leaſe made; for this eſtoppel runs upon the land, and alters the intereſt of it.

TREVIVAN *againſt* LAWRENCE AND OTHERS.

* [258]

3 Keb. 170. 324. 1 Keb. 95. 113.

Vide Hob. 207.

1 Salk. 276. 2 Mod. 115. 2 Keb. 364. Raym. 21. 1 Lev. 43. Ld. Ray. 595. 729.

THIS CASE having been thus ſpoke to in *Eaſter Term*, pended in conſideration until this Term: when

PER TOTAM CURIAM, Judgment was given for the plaintiff,

HOLT, *Chief Juſtice*, putting the caſe ſhortly thus: A *ſcire facias* by an adminiſtrator upon a judgment in *Trinity Term*, the record being in truth of that Term, but no judgment until *Michaelmas Term*; and the defendants being all, except one, returned, plead "*nul tiel record*;" and the record of *Michaelmas Term* produced, and judgment on the *ſcire facias*, and an award of execution, *elegit* taken out, and *an extent* thereon, and an ejectment brought to get poſſeſſion; and now it is found out, that there was no ſuch judgment as the *ſcire facias* recited: What then? All theſe perſons are eſtopped; for now they are not bound on the plaintiff's ſide to give the record of the original judgment in evidence, but only the award of execution on the *ſcire facias*; for being all, except one, returned *terretenants*, they are all, except him, eſtopped thereby from ſaying, that there was no ſuch judgment; and as to him too, he is eſtopped if he do not ſhew a title

TREVIVAN *against* LAWRENCE AND OTHERS.

paramount the judgment on the *ſcire facias*, for this is an eſtoppel that works upon the intereſt of the land; and it is like a judgment againſt one who is afterwards diſſeiſed, or a *ſcire facias* againſt an iſſue in tail, who makes a default, or pleads other plea which is found againſt him, whereby execution is awarded, he ſhall not afterwards be admitted to ſay, that his anceſtor was tenant in tail, and he heir to the intail. Even upon the eſtoppel the plaintiff in the judgment ſhall maintain an ejectment: as if a man make a leaſe by indenture of land which is not his, and after purchaſe it, that leaſe ſhall bind him, his heirs, and aſſigns; and an eſtoppel that affects the intereſt of the land ſhall run with it to whoever takes it; and none that are parties to, or claimants under, this recovery, ſhall falſify it.

And judgment was given for the plaintiff.

* [259]

Caſe 371.

* Fitz-Hugh *againſt* Dennington.

If a *maſter* give a bond to make his *apprentice* free of the city at the end of ſeven years, *if requeſted*, the defendant may plead, to an action of debt on this bond, "that "at the end of "ſeven years, "or after, he "was not re-"queſted, &c." for he was not bound to do it, except upon requeſt made at the time appointed for the performance. * S. C. ante, 227.

THIS CASE being moved again, BROTHERICK urged that the plea was naught, and therefore judgment ought to be affirmed. We were to be made free, at the end of ſeven or eight years from the date of the bond, of THE COMPANY OF JOINERS, if we deſired it; then the election is ours, to be made free at the end of ſeven years, or elſe at the end of eight; and this ought to be determined in ſome convenient time before the end of ſeven years, that the obligor might have all things ready to perform his condition, which was to be at the end, that is, the laſt day of the ſeventh year; and how has the obligor diſcharged himſelf by ſaying, that we have not requeſted him at the end of ſeven years, or ever after before the action brought? for a requeſt before the end of ſeven years, in ſuch convenient time as the obligor might have reaſonable time to get us made free at the end of ſeven years, would be a good requeſt to entitle us to our action; and that would not come within their plea. If one be bound to pay twenty pounds, or twenty kine, in a month, at the election of the obligee, there the obligee is to make his election in a convenient time, that the obligor may provide what he chooſes, and need not provide both (*a*). So if one be bound to make the obligee a conveyance by fine or feoffment by ſuch a day at the election of the obligee, the obligee is to determine his election in a convenient time before the end of the Term (*b*). So here we were to make a requeſt in a convenient time before the end of ſeven years, and they have not denied that we have ſo done; but only ſay, that we have not done it at the end of ſeven years. 1. *Lev.* 68. 1. *Ro. Ab.* 374. *Bridgm.* 41. *Aleyn*, 25. *Style*, 49. 74.

S. C. 2. Salk, 585. S. C. 3. Salk 309. S. C. Holt, 68. S. C. 2. Ld. Ray. 1094. 1. Cro. 179. 280. 2. Cro. 183. 652. 2. Bulſt. 229. Yelv. 66. 3. Bulſt. 297. 10. Mod. 519. 12. Mod. 413. 455. 461. 503. Gilb. E. R. 251.

HOLT, *Chief Juſtice*. The obligor was to make him free at the end of ſeven years, or eight years, if thereunto requeſted. Let us then go by ſteps: Suppoſe it were to make him free at the end

(*a*) (*b*)

of

of ſeven years, if thereunto requeſted, and the defendant pleads, that at the end of ſeven years he was not requeſted; Why is not that a good plea, for it is directly the words of the condition? But what ſhall be underſtood to have been meant by "the end of ſeven "years?" Whether after they are expired, or juſt at the end of them, ſo as he ought to be made free on the laſt day of the ſeven years? When a man is to do a thing by ſuch a time if requeſted, there if the thing in its nature may be done at the time of requeſt, then the requeſt is to be made on the laſt convenient part of that time: as if a man be bound to pay money on *Lady-day* if requeſted, there the requeſt is to be on the laſt convenient time before ſun-ſet of that day on which ſuch a ſum may be paid; and if it were a thing the doing whereof required more time, ought not that to come on the plaintiff's ſide in his replication? And he took it clearly, that the requeſt here ought to have been on the laſt moſt convenient time of the laſt day of the ſeventh year, and that it would come too late the next * day: as if leſſee covenant to leave all things in good order, and to vacate the premiſſes at the end of his term, he muſt do it on the laſt day, and cannot ſave his covenant by doing it the day after; for the end of a thing is part of that of which it is an end: but here the condition being, "at the end of ſeven or eight "years," if the plea had been, that he did not requeſt at the end of ſeven years, without going further, it had been bad.

FITZ-HUGH *againſt* DENNINGTON.

* [260]

POWELL, *Juſtice*, ſeemed to incline, that a requeſt in a day or two after the ſeven years would be well; though he agreed, that, in demand for rent, it muſt be on the laſt convenient time of the day, becauſe there the law appoints a place where the requeſt is to be made; but this muſt be a perſonal requeſt, and no place appointed for it.

Vide Fareſh. 143, 144. Pal. 321.

HOLT, *Chief Juſtice*. In a bond where there is no demand for the payment of money at ſuch a day and place, the obligor muſt bring the money the laſt part of the day to the place; and if there be no place appointed, he muſt ſeek him out, if he be in *England*. If there be a place appointed, and he has an election to do the thing on or before the day, there he may give the obligee notice to be there at the day; and if he do not come, and the obligor is there and tenders, he ſaves his bond: as if a man be bound to enfeoff one of lands in *York* the laſt day of *November*, and the covenantee ſtay here in town; yet if the covenantor do not go down and tender, he breaks his covenant. And there is a difference when a time is appointed and when not; for if a feoffment be to be made at ſuch a time if requeſted, there the requeſt is to be made at that time; but if there be no time fixed, then the requeſt is to be made at ſome reaſonable time before, and the feoffment need not be made immediately thereupon: and the caſe in 1. *Roll. Abr.* 443. for payment of money in *Holland* on requeſt, and a requeſt in *England* was held good, is upon this diverſity.

1. Bac. Abr. 279.

FITZ-HUGH *againſt* DENNINGTON. 2. Salk. 585.

And now HOLT, *Chief Juſtice*, and POWELL, *Juſtice*, The end of ſeven years muſt be the laſt convenient time of that day; and it is juſt like a demand, which muſt be on ſuch time as the thing may be done on. Indeed, if you had come and ſaid, that the defendant was a great way off on the laſt day, it had been ſomething; and though the end of the day be the laſt inſtant of it to many purpoſes, yet as to acts to be done thereon it is not ſo; for day then is between ſun-riſe and ſun-ſet, which is the time for men to work on; and therefore if a demand be to be on *Midſummer-Day*, it may be good at eight of the clock in the afternoon; whereas in *December* it muſt not be much after four.

Vide 2. Danv. 264.

S. C. 1. Salk. 40. 44.

And HOLT, *Chief Juſtice*, ſaid, that it had been adjudged that if one be born on the firſt of *February* at eleven o'clock at night, and on the laſt of *January* in the one-and-twentieth year, at one of the clock in the morning, he makes his will and dies, ſuch will is good, * for he then was of age.

* [261]

And THEY ALL AGREED, that the plea was good, though they differed about the time on which the requeſt was to have been made, *viz.* whether on the laſt day of ſeven years, or after,

The judgment was unanimouſly reverſed.

Caſe 372. Leiceſter *againſt* Foy.

Quære, Whether it be a good *modus* to pay from *April* to *November* every tenth day's milk ſkimmed and made into cheeſe, in lieu of all tithe milk.

PROHIBITION was moved for to ſtay a ſuit, by a vicar, in the ſpiritual court, for *tithe-milk*, upon a ſuggeſtion of a *modus*, that the inhabitants of that place did, from ſuch a day in *April* until *All Saints*, pay every tenth day's milk ſkimmed, and made into cheeſe, and *ratione inde* were diſcharged of all *tithe-milk*.

S. C. 2. Ld. Ray. 1171. Bunb. 28. 73. Ld. Ray. 189. 359.

EYRE *againſt the prohibition*. It is true, making the tithes of one crop into hay, will be a good cauſe of diſcharge of tithe of aftermowth. But he denied that it would be a good *modus* to ſay, that for making the aftermowth into hay, they ſhould be diſcharged of tithe of the firſt crop; and this *modus* amounts to a *non decimando* of the cream.

Contra was urged the caſe of *Auſtin v. Lucas* (*a*), a *modus* to pay the tenth cheeſe made from ſuch a time to ſuch a time in lieu of all *tithe-milk*, and though it be but for part of a year, yet being what they are not bound to do, it is a good diſcharge of *tithe-milk* all the year (*b*). Suppoſe it were to pay *a groat* a year for all *tithe milk*, it would be well; and why not this?

And though THE COURT did not like the *modus*, as ſeeming very ſevere on the vicar; yet to ſettle the point, which they

(*a*) Cro. Eliz. 699. Moor, 909. (*b*) See Lutch. 222. Raym. 477.

thought

thought of great conſequence, they granted *a prohibition* directing them to declare forthwith (*a*). LEICESTER *againſt* FOX.

(*a*). The declaration came on to be argued in Trinity Term, 4. *Anne*; but the deciſion of the queſtion was evaded by the Court granting a *conſultation*, becauſe the plaintiff had not proved his ſuggeſtion within the ſix months required by 2. & 3. *Edw.* 6. c. 13. ſ. 14. which act, it was agreed, extends to prohibitions to ſuits for *ſmall tithes* as well as great, S. C. 2. Ld. Ray. 1172.—But ſee Hill v. Vaux, 1. Ld. Ray. 358. S. C. 2. Salk. 656. S. C. Carth. 461. S. C. 12. Mod. 206.

Goddard *againſt* Smith. Caſe 373.

Declaration in caſe on conſpiracy for a falſe and malicious indictment of barretry, whereof he was acquitted.

Salk. 21. 6. Mod. 261. 3. Salk. 245. Rep. A. Q. 56. Holt, 497. S. C.

MIDDLESEX, *to wit* } BE IT REMEMBERED, that heretofore, that is to ſay, in the Term of the *Holy Trinity* laſt paſt, before our lady the queen at *Weſtminſter*, came *Richard Goddard*, by *Henry Wright* his attorney, and brought into the court of our ſaid lady the queen then there his certain bill againſt *Richard Smith* and *Chriſtopher Preſton*, in the cuſtody of the marſhal, &c. of a plea of treſpaſs upon the caſe; and there are pledges of proſecuting, namely, *John Doe* and *Richard Roe*, which ſaid bill followeth in theſe words, that is to ſay: *Middleſex*, to wit, *Richard Goddard* complains of *Richard Smith* and *Chriſtopher Preſton*, in the cuſtody of the marſhal of the *Marſhalſea* of our lady the queen, before the queen herſelf being, for that, to wit, that whereas the ſaid *Richard Goddard* is a good, true, faithful, peaceable, and honeſt ſubject and liege man of our lady the now queen, and was of a good name, fame, reputation, converſation, behaviour, and condition, and as a good, true, faithful, peaceable, and honeſt liege man and ſubject of the ſaid lady the now queen, being without any ſcandal, imputation, or reproach, and hath not behaved or demeaned himſelf at any time from the time of his nativity hitherto as a barretor or diſturber of the peace of the ſaid lady the queen, nor was in ſuſpicion of the like crime amongſt his neighbours and other ſubjects of the ſaid lady the queen to whom the ſaid *Richard Goddard* was known, and by reaſon of his honeſt and quiet converſation aforeſaid, for the whole time aforeſaid, lawfully and honeſtly gained and acquired great credit and eſteem, and alſo divers great gains and profits from his neighbours and other ſubjects of our ſaid lady the queen, with whom the ſaid *Richard Goddard* had commerce for the ſupport of himſelf and his family: nevertheleſs the ſaid *Richard Smith* and *Chriſtopher*, not ignorant of the premiſes, but contriving and maliciouſly intending not only to deprive him the ſaid *Richard Goddard* of his good name, fame, and eſteem aforeſaid, but alſo to bring him the ſaid *Richard Goddard* into ignominy and public diſgrace, that by reaſon thereof the ſubjects of the ſaid lady the queen might withdraw themſelves from the fellowſhip of him the ſaid *Richard Goddard*, and might altogether ceaſe and deſiſt from dealing and having commerce with him in any manner, on the thirteenth day of *September*, in the firſt year of the reign of the ſaid lady *Anne*, now *Queen of England*, &c. at the pariſh of *St. James*, *Clerkenwell*,

GODDARD against SMITH.

Clerkenwell, in the county aforeſaid, then and there having had a conſpiracy between themſelves falſly and maliciouſly, to cauſe the ſaid *Richard Goddard* to be indicted as a barretor and public diſturber of the peace of the ſaid lady the queen, without any cauſe or colour of ſuch crime being committed by him the ſaid *Richard Goddard*, they the ſame *Richard Smith* and *Chriſtopher*, at the pariſh aforeſaid, in the county aforeſaid, in proſecution and execution of their malicious intention and conſpiracy aforeſaid, at the general quarter-ſeſſions of the peace of our lady the queen held for the county of *Middleſex*, at *Hicks's Hall*, in *St. John Street*, in the county aforeſaid, before *John Bennet*, *Henry Hawley*, and *Joſeph Offley*, *Eſquires*, and other their fellow juſtices of the ſaid lady the queen, appointed to keep the peace in the county aforeſaid, and alſo to hear and determine divers felonies, treſpaſſes, contempts, and miſdemeanors, in the ſame county committed, falſly and maliciouſly cauſed and procured the ſaid *Richard Goddard*, with intent to defame the ſame *Richard Goddard*, without any lawful or true cauſe, to be indicted by the name of *Richard Goddard*, late of the pariſh of *St. James*, *Clerkenwell*, in the county of *Middleſex*, yeoman, for that the ſame *Richard Goddard*, on the firſt day of *January*, in the firſt year aboveſaid, and divers other days and times as well before as afterwards, at the pariſh aforeſaid, in the county aforeſaid, had been and then was a common barretor, and a common, daily, and public diſturber of the peace of the ſaid lady the now queen, and alſo a common and turbulent ſlanderer and ſower of quarrels and diſcords amongſt his quiet and honeſt neighbours, ſo that he moved, procured, and ſtirred up divers contentions and controverſies, and alſo brawlings, quarrels, and fights, at the pariſh aforeſaid, in the county aforeſaid, and elſewhere in the ſaid county of *Middleſex*, amongſt divers liege ſubjects of the ſaid lady the queen, to the great diſturbance of the peace of the ſaid lady the now queen, to the evil example of all others in the like caſe offending, and againſt the peace of the ſaid lady the now queen, her crown and dignity, &c. and did falſly and maliciouſly proſecute and cauſe to be proſecuted the ſaid indictment againſt the ſaid *Richard Goddard*, until the ſaid lady the now queen cauſed that indictment afterwards, for certain reaſons, to come to be determined before her: and the ſheriff of the county aforeſaid was commanded that he ſhould not omit, &c. but cauſe him to come and anſwer, &c. And he the ſaid *Richard Goddard* afterwards, to wit, in the Term of *St. Michael*, in the ſecond year of the reign of the ſaid lady the now queen, in the court of our lady the queen, before the queen herſelf, the ſame court being at *Weſtminſter*, was, according to the law and cuſtom of this kingdom of *England*, in a due and lawful manner thereof diſcharged. By pretence of which ſaid premiſes againſt him the ſaid *Richard Goddard*, by the ſaid *Richard Smith* and *Chriſtopher Preſton* in form aforeſaid publiſhed, done, exhibited, and proſecuted, the ſame *Richard Goddard* is not only very much hurt and injured in his good name, fame, credit, and reputation aforeſaid,

Indictment at Hicks's Hall.

Removed by certiorari.

Diſcharged.

aforesaid, and disquieted and weakened in his body, but was also forced to expend and lay out divers large sums of money in and about acquitting and discharging himself of the said indictment, and defending his innocence, to the very great discredit and extreme impoverishment of him the said *Richard Goddard*, and to the damage of the said *Richard Goddard* of twenty pounds: and thereupon he brings suit, &c. Goddard *against* Smith.

And now at this day, to wit, *Monday* next after three weeks from the day of *St. Michael* in this same Term, till which day the said *Richard Smith* and *Christopher* had leave to imparl to the said bill, and then to answer, &c. before our lady the queen at *Westminster* comes as well the said *Richard* by his said attorney as the said *Richard Smith* and *Christopher* by *Edmund Butler* their attorney: and the said *Richard* and *Christopher* defend the force and injury, when, &c. and say, that they are in no manner guilty of the premises above laid to their charge, as the said *Richard Goddard* above complains against them: and of this they put themselves upon the country; and the said *Richard Goddard* likewise, &c. Therefore let a jury come thereupon before our lady the queen at *Westminster*, on *Monday* next after the morrow of *Souls*, and who neither, &c. to recognize, &c. because as well, &c. The same day is given to the parties aforesaid there, &c.

Goddard *against* Smith. Case 374.

CASE for maliciously indicting him of *barretry* without *probable cause*, setting forth, that he was *debito modo inde exoneratus*.

A declaration for maliciously indicting the plaintiff for *barretry* without probable cause, stating, that he was in due manner thereupon *discharged*, is not maintained by evidence that he was discharged by means of a *nolle prosequi* entered by THE ATTORNEY GENERAL; but if he had pleaded *not guilty*, and the attorney-general had *confessed* the plea, that would have maintained the declaration.—S. C. 1. Salk. 21. S. C. 3. Salk. 245. S. C. 11. Mod. 56. S. C. Holt, 497. Ante, 25. 216. 2. Salk. 456. Ld. Ray. 721. 3. Hawk. P. C. ch. 72. ſ. 2. 1. Bl. Rep. 385. 1. Bac. Abr. 62, 63.

At the trial, to prove the declaration the plaintiff produced a *nolle ulterius prosequi* by THE ATTORNEY GENERAL.

HOLT, *Chief Justice*, doubting whether this evidence maintained the declaration, and strongly inclining that it did not, reserved it for the opinion of the Court; and he said, that the entering a *nolle prosequi* was only putting the defendant *sine die*, and so far from discharging him from the offence, that it did not discharge any further prosecution upon that very indictment, but that, notwithstanding, new process might be made out upon it; and sure it is hard to allow a man who gets off by a *nolle prosequi* to maintain an action for a malicious prosecution. Indeed, if he had pleaded *not guilty*, and THE ATTORNEY GENERAL had confessed it, that would have done; but he who gets off upon a *nolle prosequi* does not

at

GODDARD *against* SMITH.

at all get off on the merits of the cauſe; and to maintain a *conſpiracy*, it is neceſſary to lay and prove an acquittal (*a*). For in an action for ſuing for a great ſum in order to hold to extravagant bail, the plaintiff muſt ſhew what became of that cauſe in order to maintain his action; and ſo is my *Lord Hobart*. But this here is not ſo much as *a nonſuit*, for the indictment ſtands ſtill in force, and THE ATTORNEY GENERAL muſt make new proceſs upon it when he pleaſes. But he remembered a cauſe about twenty years ago, in which WYNDHAM, *Juſtice*, directed for the plaintiff on the ſame point, and ſaid, he thought it hard even at that time.

A *nolle proſequi* does not diſcharge the *crime*; it only puts the defendant *without day*; and therefore the attorney-general may iſſue *other proceſs* on the indictment; but an *acquittal* goes to *the fact* charged.

1. Salk. 21.
1. Sid. 420.
2. Salk. 456.
1. Vent. 33.
2. Keb. 521.
5. Mod. 394.
4. Com. Dig. "Indictment" (K.). "Juſtices" (W. 3.).
10. Mod. 216. 152.
12. Mod. 648. 654.
3. Peer. Wms. 429.

MOUNTAGUE urged, that it is *attornat. domine regine ipſum, &c. inde non vult ulterius proſequi*: ſo he would have the *inde* to go to the fact charged.

But THE WHOLE COURT was of a contrary opinion; for at moſt it can go but to that indictment, and cannot be pleaded to a new indictment for the ſame offence, for a *nolle proſequi* at that rate would amount to a pardon.

POWELL, *Juſtice*. In all caſes of conſpiracy the *inde acquietat* goes to the fact charged, and not to the indictment; for if it went to the indictment, and the indictment were vicious, conſpiracy would lie, but that is not ſo; and colourable proof would deſtroy this action; and the plaintiff by procuring this *nolle proſequi* bars the defendant from giving ſuch proof; and this action cannot be maintained but upon an acquittal, of the fact charged, by verdict, confeſſion, &c.: but he doubted of the effect of a *nolle proſequi* upon an indictment, whether it diſcharged the indictment, or only put the defendant *without day*, and that notwithſtanding THE ATTORNEY-GENERAL might iſſue new proceſs upon it.

HOLT, *Chief Juſtice*, ſaid, that he had known it thought very hard that THE ATTORNEY GENERAL ſhould enter *nolle proſequi* upon *indictments*, and that it began firſt to be practiſed in the latter end of *King Charles the Second*'s reign, but that on *informations* it had been frequently done: and he ordered precedents to be ſearched if any were in *Mr. Attorney Palmer* or *Nottingham*'s time.

HARCOURT, *Maſter of the Office*. There never has been any proceedings after a *nolle proſequi*.

In *barretry*, the particulars muſt be given.

And PER OMNES, In caſe of *barretry*, the defendant upon motion may have a rule to have articles delivered to him of the inſtances, and the proſecutor ſhall not give evidence of any particular but what he has given articles of; and if the proſecutor give no articles, he ſhall give no evidence.

HOLT, *Chief Juſtice*, at another day, declared, that in all *King Charles the Firſt*'s time there is no precedent of a *nolle proſequi* on an indictment.

(*a*) 8. Co. 58.

GOULD,

GOULD, *Juſtice*, quoted a caſe in *Hardres (a)*, where it was entered on record on an *information*, and held to be a diſcharge of it. GODDARD *againſt* SMITH.

THE COURT ſeemed all clear, that the action did not lie, but gave no rule.

(a) Hard. 226. 253.

*Anonymous. Caſe 375.

HUSBAND AND WIFE came into court to acknowledge a deed made by them both, and THE COURT ordered an acknowledgement only of one of them to be entered, *viz.* of the huſband. *Baron* and *feme* acknowledge a deed in court.

Ld. Ray. 521. 2. Vern. 61. 471. 592. 11. Mod. 196. 12. Mod. 444. 609. 3. Peer. Wms. 189. Caſes Temp. Talbot, 41. 164. 167.

Cockroft *againſt* Smith. Caſe 376.

THE PLAINTIFF declared as *clerk of the court*. The defendant pleaded, that he was *an attorney* of the court, ABSQUE HOC that he is a clerk of the court. The plaintiff replied, that he is a clerk of the court, *prout patet per record. inde reſiden. in cur.* and prays the record may be inſpected. The defendant would demur, and not join in the iſſue; whereupon the plaintiff ſigned his judgment. Plaintiff declared as clerk of the court, &c.

PER CURIAM. The plaintiff is regular, and made the replication the true way without deſiring the record to be brought in.

And the defendant was forced to pay coſts to have the judgment ſet aſide.

Buxom *againſt* Hoſkins. Caſe 377.

ERROR was brought of a judgment in ejectment: and the plaintiff not aſſigning error, the defendant in error brought a *ſcire facias* againſt him to have execution, reciting a judgment of *two meſſuages, &c.* whereas the judgment in truth was *de uno meſſuagio.* And to this the plaintiff pleads *nul tiel record.* If a writ of error be brought on a judgment in ejectment, and, on neglect to aſſign error, the defendant bring a *ſcire facias quare executionem non*, and recite the judgment to be of *two* meſſuages, when it was only of *one* meſſuage, the

It was now moved to amend it; and for amendments of *ſcire facias* were quoted, 1. *Roll. Abr.* 197. 797. 22. *Edw.* 4. 6. 2. *Keb.* 175. 2. *Cro.* 372. *Br. Abr.* 20. *ſect.* 20. 3. *Cro.* 760. 2. *Sid.* 7. 12.

HOLT, *Chief Juſtice.* This ſort of *ſcire facias* is always to have *execution*, and the writ thus mentions it; and the plaintiff in error

variance cannot be amended after "*nul tiel record*" pleaded.—S. C. poſt. 310. S. C. 1. Salk. 52. S. C. 3. Salk. 32. S. C. Holt, 58. 762. S. C. 2. Ld. Ray. 1057. Poſt. 286. 8. Mod. 313. 366. 1. Stra. 401. 2. Stra. 1165.

may,

Buxton *ſaint* Hoskins.

may, if he pleaſe, plead to it a writ of error brought, and ſtill depending, and aſſign error.

And HOLT, *Chief Juſtice*, and the reſt of THE COURT, There is a difference when the writ is bad and vicious on the face of it, and when it is good in the frame of it, but not fitted to that particular purpoſe; and all the caſes put of amendment are of the firſt kind; and ſome colour there would be to amend in this caſe if the defendant had appeared and pleaded ſome other plea, or had taken no advantage of this ſlip, ſo as the proceedings would have been vitious without amendment; but here he having taken advantage of this ſlip by pleading *nul tiel record*, ſhall we vitiate his plea by an amendment? And they agreed, that wherever an original was amendable, there a *ſcire facias* would be ſo too; but ſaid, that this [264] would not be amended in an original writ * of error. Why? Becauſe it is a good writ, and would well remove the record it deſcribes if any were; and quoted the caſes of *Haniold v. Jeffey (a)*, and *Thomſon v. Crocker (b)*. And he ſaid, if a *formedon* were made for ten acres, when the inſtructions given are for twenty, he doubted it could not be amended; for the ſtatute is to cure only miſtakes of clerks which would endanger the reverſing of judgments, and not to alter matters of fact, by extending it further than it was before; and if this writ be good in itſelf, but not *ad idem*, the party may take out another writ pending this; for if this writ be not *ad idem*, it cannot be pleaded in bar of the other; and againſt the caſe of *Wheaden v. Jugg (c)*, which HOLT, *Chief Juſtice*, ſaid was a great ſtrain, was quoted the caſe of *Walker v. Riches (d)*, and to amend this writ were quite to alter the nature of the writ after it is returned and executed; which ought not to be.

Vide poſt. 269, 270, &c. 2. Show. 304, 305.

ET PER CURIAM, No amendment.

(a) Eaſter Term, 9. *Will.* 3.
(b) 12. *Will.* 3.
(c) Cro. Jac. 372.
(d) Cro. Car. 162, 163.

Caſe 378.

Ward *againſt* Apprice.

If one of ſeveral partners receive money on the joint account, and give his *note* for it, and enter his expenditures in the partnerſhip-books, and then the other partners poſſeſs themſelves of the books, and bring an action againſt him for the monies he received to their uſe, THE COURT will not *order* the plaintiffs to produce the books at the trial, but the defendant may give them *notice* ſo to do, and thereby raiſe a preſumption againſt them if they refuſe.—3. Salk. 285. 2. Salk. 690. Ld. Ray. 340. 737. 851. 871. 920. 927. 1285. 8. Mod. 166. 242.

AN INDEBITATUS ASSUMPSIT for money received to the plaintiff's uſe.

BROTHERICK opened this matter at the bar, that the plaintiff, the defendant, and ſeveral others, were part-owners of a ſhip, and ſeveral ſums of money were given by the reſt of the part-owners to the defendant, for the uſe of the ſhip, for the receipt whereof he had given A NOTE; that the defendant had actually laid out the ſaid ſums on the ſhip and voyage, and entered an account of the manner, &c. in a certain book kept for the affairs of the ſhip; and then an allowance thereof was entered likewiſe in that book, which book did belong to the plaintiff, the defendant, and the other part-owners in common, and now was in the plaintiff's poſſeſſion.

And

And upon this matter, made out by *affidavit*, HE MOVED, that the plaintiff ſhould either produce that book at the trial, or let the defendant take copies of ſuch entries and allowances of payment therein as would be proper for him to make his defence by; and ſaid, this ought to be as well as if a man bring an action of covenant upon an indenture, and the defendant ſwear that he never had a copy, you will not compel him to plead until the plaintiff furniſh him with a copy. WADE *againſt* APPLEBY.

Quod Curia conceſſit. But here the defendant ſhould have taken up his NOTE upon the account allowed. You have entruſted him with the cuſtody of this book; and if he has broke his truſt, you muſt ſeek for remedy in equity. If an action be brought by a ſhopkeeper for money due on the ſale of goods, we never enforce him to produce his books; but if very ſlender evidence be given againſt him, then, if he will not produce his books, it brings a great ſlur upon his cauſe.

HOLT, *Chief Juſtice*, ſaid, that the plaintiff would do well to conſider, whether an *indebitatus aſſumpſit* would lie in this caſe.

And they would do nothing in it.

THE COURT, notwithſtanding, owned it to be a miſchievous caſe, where many are tenants in common, or copartners in a trade, and have one common book of their tranſactions, and one has the poſſeſſion of it, and then brings actions againſt the others. *[265]

* Gree *againſt* Sharp. Caſe 379.

EJECTMENT upon a demiſe at ſuch a place in *Devonſhire*, of lands in another vill in the ſame county, and the *venire facias* was from the place of the demiſe. The cauſe being carried down, and *a view* granted, there being a jury and a *decem tales*; now, at the trial, a panel was returned promiſcuouſly of the jury, and *decem tales*. New trial on account of a panel being returned improperly. 1. Keb. 179. 418. 3. Keb. 193, 254. 485.

And for this irregularity *a new trial* was now granted.

PER CURIAM. In ejectment, *the venue* ought to come always from the place where the lands lie, and not from the place where the demiſe is laid to be made: but that fault is cured after verdict by the *ſtatute of Oxford*. The venue in ejectment muſt come from the place where the lands lie.

8. C. Holt, 404. 2. Salk. 665. 545.

HOLT, *Chief Juſtice*. There is a difference between the practice of common pleas and this court, in caſe of *views* granted (*a*). If upon a full jury in the common pleas *the view* be granted, and a juror withdrawn, an entry is made of this, and proceſs continued againſt the jury, and a *decem tales* awarded on THE ROLL, and there may be a command of a *tales de circumſtantibus* The different practice of the court of king's bench and common pleas on granting a view.

(*a*) See 4. *Ann.* c. 16. § 8.

beſides;

GREE *againſt* SHARP.

beſides; but in the king's bench, if a full jury appear, and *a view* be granted, and a juror be withdrawn, they take no notice of it by entry, but only grant a new *diſtringas* againſt the ſame jury, except the juror withdrawn; but if there be a *decem tales* awarded here, and a jury appear, and *a view* be granted, there they muſt take notice of it by entry, and continue proceſs againſt the jury, and *decem tales*; otherwiſe the *decem tales* would be diſcharged: and *the diſtringas* of the *decem tales* muſt be the ſame *decem tales* returned upon the firſt writ; and to mix the perſons returned on the principal panel, and the *decem tales* in the panel that tries the cauſe after the view, is irregular.

Therefore the verdict was ſet aſide.

Caſe 380.

Strong *againſt* Courtney.

An agreement that a man ſhall enjoy certain lands which are in his poſſeſſion, and charged with an annuity to a third perſon, without moleſtation from the annuitant, is not a ſufficient conſideration for a promiſe.

SPECIAL ASSUMPSIT, ſetting out, that whereas *James Turner* had a rent-charge iſſuing out of the defendant's land, the defendant, in conſideration the plaintiff would indemnify and ſave him harmleſs againſt all diſtreſſes to be taken by *James Turner*, out, of, or upon, the premiſes, promiſed to pay him ſuch a ſum. Upon *non aſſumpſit*, and verdict for the plaintiff,

IT WAS URGED, that no right of diſtraining appeared for the ſaid *James*, therefore no conſideration for the promiſe.

And of this opinion was ALL THE COURT, though it was after verdict; which, they ſaid, would not cure the want of conſideration; but that, if it had appeared that the rent had been aſſigned to *James*, it would have been otherwiſe.

S. C. Ld. Ray. 1217. S. C. Salk. 364. Carth. 446. 10. Mod. 294. 11. Mod. 147. 214. 12. Mod. 16. 214. 250. 308. 324. Fitzg. 202. 303. Comy. 98. Ld. Ray. 368. 1. Stra. 94. 653. 2. Stra. 933.

* [266]

Caſe 381.

* Garibaldo *againſt* Cagnoni.

Bail was formerly liable only when the plaintiff did not recover *a greater ſum* than that which was laid in the action; for if he did, the bail was thereby diſcharged from his recognizance; but now in the *king's bench*, bail are liable to the ſum ſworn to and indorſed on the writ in the actions in which they became bail, and any *leſſer ſum*, and alſo to *the coſts* of ſuch action; but in the *common pleas*, the bail-bond being taken in double the ſum indorſed in the writ, they are liable to ſatisfy the whole debt due, to the extent of *the penalty*. — S. C. 1. Salk. 102. S. C. Holt, 89. 1. Sid. 276. 307. 2. Keb. 101. 1. Mod. 8. 2. Keb. 552. 2. Sid. 425. 1. Ven. 44. 1. Com. Dig. 692. 8. Mod. 227. 11. Mod. 275. Stra. 922.

A CONVICTION upon an indictment of battery being againſt *Garibaldo*, he, in conſideration that *Cagnoni* the proſecutor would not preſs for a great fine, undertook to put in *ſpecial bail* to an action of treſpaſs to be brought by the plaintiff for the ſaid battery.

At this time, a writ which the plaintiff *Cagnoni* had taken out, and returnable in *Michaelmas Term* paſt, was run out; and in *Hilary Term* bail was put in, and, after a trial, one hundred pounds damages were given to the plaintiff.

And now a *ſcire facias* being againſt the bail, they applied to the Court for relief; for that the *ac etiam*, which was by leave put in

the

the ſaid writ in *Michaelmas Term*, was only forty pounds, and the bail meant to undertake for no more; and ſince the plaintiff had declared to more damages, and recovered more, the bail were thereby altogether diſcharged: and a rule of Court ſaid to have been made in the twenty-ſecond year of King *Charles the Second*, and found by MR. CLARKE in the then ſecondary's book, that in caſe of bail, if the recovery were for more than was mentioned in the *ac etiam*, the bail ſhould not be charged at all *in iſtâ actione*, was very much inſiſted on. GARIBALDO *againſt* CAGNOWL.

HOLT, *Chief Juſtice*, remembered a caſe of *Thomſon v. Collins (a)*, in which he had been of counſel, in my LORD PEMBERTON's time; where in an *indebitatus aſſumpſit* the declaration and recovery was for more than the *ac etiam*; and there, though it was offered to level it with the *ac etiam* by entering a *remittur* on the record for the reſt, it was denied them on debate.

NOTE, In this caſe upon ſearch, this rule could not be found in the clerk of the rules book.

HOLT, *Chief Juſtice*, ſaid, there was reaſon for ſuch a rule to purſue the act 13. *Car.* 2. c. 2. that bail ſhould know what they came bound for, and not to be ſaddled with more; and that muſt be by recovering no more than was mentioned in *the writ*, to which the bail of neceſſity muſt relate: whereas if the plaintiff recovers more, the bail, if at all liable, muſt be liable for what is recovered; for their condition is to anſwer the condemnation, or render the principal; and it would be extreme hard to enſnare the bail to a greater ſum than is mentioned in the writ: and ſince the proceſs againſt them muſt be founded upon the judgment, it ſeems from thence they muſt anſwer for all or none; but if leſs than is mentioned in the writ be recovered, then there is no inconvenience to the bail; and if there be no bail inſiſted on but common bail, it is but juſt the wrong-doer ſhould anſwer whatever is recovered. And he further ſaid, that in caſes of outrageous batteries, when people came to him for leave to charge with *ac etiams*, he would give leave to charge with a good ſum; but when they came for bail, they muſt be content with bail of reaſonable value, and not inſiſt upon their worth in proportion to the ſum charged.

* POWELL, *Juſtice*, and the reſt, agreed, that bail by no means ought to anſwer for more than was mentioned in the *ac etiam*. *[267]

POWELL, *Juſtice*, added, that if ſuch a rule, as was mentioned, had been, the reaſonable conſtruction of it would be, not to ſuffer the bail to be charged with more than was mentioned in *the writ*, but likewiſe not to diſcharge them for good and all; for though it be true that the proceſs againſt them muſt be for the ſum recovered, yet he ſaid the Court might hold the plaintiff from levying more than was mentioned in his writ, and the bail, upon bringing ſo much into court, might obtain a rule to ſtay any further 1. Sid. 183. 258.

(a)

CARIBALDO *againſt* CAGNONI.

proceedings againſt them; as is done every day in caſe of render of the principal before the return of the ſecond *ſcire facias*, though in ſtrictneſs of law they ought not to do it after a *capias* returned againſt the principal.

HOLT, *Chief Juſtice*, ſaid, that the caſes differed very much; for this rule was made in imitation and purſuance of the law, and they ought not to make any conſtruction contrary to it, and the words of it were, that the bail ſhould be looked upon as none *in iſtâ actione*; and to render before return of the ſecond *ſcire facias*, that was ſo by the ancient courſe and practice of the court.

But then IT WAS FURTHER MOVED, that the bail being of *Hilary Term* could not be looked upon as bail to the writ returnable in *Michaelmas Term*, and then the caſe would be no more than if one had by conſent, upon a good conſideration, put in ſpecial bail in a general action of aſſault and battery, in which caſe there would be no pretence of a ſurprize on the bail, and therefore they ought to anſwer the whole condemnation.

THE COURT inclined to this; but being informed there was never any other writ taken out,

CLERK, *the Secondary*, informed the Court, that the filing of bail without a writ taken out before or after, was void:

Which HOLT, *Chief Juſtice*, and GOULD, *Juſtice*, affirmed to be true.

But THE OTHER CLERKS all ſaid, that the rule was underſtood thus, *viz.* that if bail were filed by conſent, and no writ already taken out, nor taken out within eight days after, the bail was void, that is to ſay, the defendant was not thereby obliged to accept of a declaration; but if he did accept one, it would be well; and this ſeemed a reaſonable explication.

At laſt the whole was referred to MR. CLERK to examine. *Quære quid inde venit.*

HOLT, *Chief Juſtice*, wiſhed the attornies to beware of charging extravagant *ac etiams*, for otherwiſe an action on the caſe would lie for holding to exceſſive bail.

1. Sid. 183. 12. Mod. 257. 273.

NOTE LIKEWISE, the ſame point, in regard to a recovery above the *ac etiam*, came in queſtion afterwards this Term in the caſe of *Bovey v. Wheeler*.

HOLT, *Chief Juſtice*, then ſaid, that the above-mentioned rule was made to rectify an extraordinary practice in this court; which was, If a * man became bound for another in an action of ten pounds, he was thereby bail in all actions of the ſame Term, by the ſame plaintiff againſt that defendant, let the ſum be ever ſo great, which was mighty inconvenient.

[268]

And

And this rule was made in pursuance of the statute of 13. *Car.* 2. c. 2. that the bail might know what they undertook for (*a*).

GARRALD *against* CABNONE.

(*a*) In the case of Welch *v.* York it was agreed to be settled by the Court, that the bail was liable to all actions for *a less sum* than that mentioned in the declaration, but not to any action for *a greater sum*, 3. Keb. 16. But the practice upon this point seems now to be settled by the case of *Martin v. Moor*: the sum sworn to was 80*l.*; the plaintiff recovered 104*l.*; and the Court resolved, that as, on the one hand, there was no colour to subject the bail to more than they were bound, let the plaintiff's demand be ever so great, so, on the other hand, there was no reason the plaintiff should suffer by his moderation in taking bail, and therefore that the recognizance should be considered as an agreement to pay the *sum sworn to*, or *deliver up the defendant*, Strange, 922. By a rule also made in Easter Term 5. *Geo.* 2. where the plaintiff declares for a recovery, or greater sum than is expressed in the process on which he declares, the bail shall not be discharged, but shall be liable for so much as is sworn to and indorsed on the process, or for any *lesser sum* which the plaintiff in *such action* shall recover, Loft, 545. But it has been determined, that the bail are liable not only to the *sum sworn to*, but to the *costs* also, Jackson *v.* Hassell, Dougl. 330. This practice, however, is confined to the court of *king's bench*; for in the court of *common pleas*, bail to the sheriff are liable *beyond the sum sworn to and costs*, to satisfy the whole debt due to the full extent of *the penalty* of the bail-bond, Mitchel *v.* Gibbons, 1. H. Bl. Rep. 76.; for although the statute 12. *Geo.* 1. c. 29. directs, "That in all cases where the cause of "action shall amount to ten pounds, "AFFIDAVIT shall be made and filed of "such cause of action, and that the sums "specified in such affidavit shall be in- "dorsed on the back of the writ or "process; and for which sum so in- "dorsed the sheriff shall take bail, and "for no more;" it is decided, that the statute is directory, and that the bond may be taken in *double the sum* sworn to, Jennings *v.* Goostree, Fort. 366.; Mall *v.* Mitchel, Pract. Reg. 67.; Walker *v.* Carter, 2. Black. Rep. 816. And in both courts a defendant may be held to special bail in an action on a judgment for ten pounds for damages and *costs*, although the original debt alone was under ten pounds, Lewis *v.* Pottle, 4. Term Rep. 570.

The Queen *against* Tutchin. Case 382.

AN INFORMATION was exhibited against *Tutchin* by THE ATTORNEY GENERAL in *Easter Term* last, for contriving, composing, and publishing, a certain seditious *libel*, intituled, "THE OBSERVATOR."

In an information *ex officio*, or other proceeding originally commenced in the court of king's bench, the *venire*, *distringas*, and other *process*, though sued out into a different county from that in which the Court sits, must be returnable at *a day certain*; but in *indictments*, or other proceedings commenced in other courts, a *common day*.—1. Danv. Abr. 335. Cro. Eliz. 820. Skin. 42. 253. 1. Lev. 2. 143. Carth. 70. 76. 157. 172. 12. Mod. 39. 248. 3. Com. Dig. "Enquest" (C. 6.).

The defendant pleaded *not guilty* in *Trinity Term*, and a *venire facias* was issued out to THE SHERIFFS OF LONDON, the fact being laid there, returnable *die Lunæ post tres Sept. Mich.* and the *distringas* was then awarded on THE ROLL in the common form, with the *nisi prius*, *die Sabb. post. crast. Animar.* but the *distringas*, through mistake, was *tested* the twenty-fourth of *October*, *viz.* the day after the return of the *venire facias*, and after verdict for THE QUEEN.

MOUNTAGUE moved in arrest of judgment,

FIRST, That the *venire* and *distringas* were made returnable at *a day certain*, whereas the fact arising in another county, it ought to have been at *a common day*.

and removed into the king's bench by *certiorari*, the *precept* must be returnable on S. C. ante, 164. S. C. Holt, 424. S. & 5. St. Tr. 532. S. C. 2. Ed. Ray. 1061.

THE QUEEN *against* TUTCHIN.

HOLT, *Chief Juſtice.* In caſe of *information*, or other proceeding originally commenced in this court, the *proceſs* may be at *a day certain*, though into another county; and ſo it has been lately ſettled here, in a caſe wherein we took it into conſideration, and ruled it ſo upon the certificate of all THE CLERKS: but if an *indictment* be removed up hither by *certiorari*, and afterwards is carried down to trial, there the *proceſs* muſt not be returned at *a day certain*, but at *a common day*. Beſides, there is great reaſon it ſhould be ſo here, for the *information* is exhibited on a *day certain*, and the defendant's appearance to it is ſo too; and he pleads to it at *a day certain*; and then why ſhould not the proceſs be ſo too? The plea is, *die Lunæ craſt. Trin.* and that is certain; for *craſt. Trin.* without more, is a common day. Indeed, in the common pleas, except it be where they proceed to *bill* or *in aſſize*, they muſt go by *common days*. And even in this court, in *aſſize*, we may go by *a day certain*; and where one is ſued here as preſent in court, all muſt be by *a day certain*: and ſo of proceedings *by bill* in any county of *England*. And ſince THE ATTORNEY-GENERAL, by reaſon of the univerſal juriſdiction of this court, may file a bill here for a crime committed in any county of *England*, he may make the *proceſs* returnable at *a day certain*, and he has his election of the one or the other.

* [269]

The REST OF THE COURT was of the ſame opinion. The difference is between things *originally begun* here, and brought hither by *certiorari*.

In an information filed *ex officio*, if the *venire facias* be returnable on *Monday* after three weeks of *St. Michael*, and the *diſtringas* awarded on the roll, with a *niſi prius*, on *Saturday* after the morrow of *All Souls*, but the *diſtringas*, through miſtake, be *teſted* the day after the return of the *venire facias*, it is a *diſcontinuance of proceſs*; but although, being a criminal caſe, it is not within the *ſtatutes of Jeofails*, yet it may, after verdict, be amended at *common law*.—4. Burr. 2570. 2. Hawk. P. C. ch. 25. ſ. 97. ch. 27. ſ. 109.

* SECONDLY, That though the *diſtringas* was well awarded on THE ROLL, on the day of the return of the *venire*, which was the day for both parties in court, yet the iſſuing a *diſtringas* the day after, and *teſted* the day after, was without warrant, as not being according to the award of the court; for by the *ſtatute of Niſi Prius*, the proceſs of *niſi prius* is to be awarded *in præſentiâ partium*, and it ought to bear *teſte* on the ſame day, or elſe it is a *diſcontinuance*.

POWYS, *Serjeant*, anſwered, that this was amendable even at common law, being a bare miſpriſion of the clerk, he having a good warrant before him to guide himſelf by, *viz.* the award of the *diſtringas* on THE ROLL, by which a day was given duly to the parties, a day of *niſi prius*. And for amendments at common law, before 14. *Edw.* 3. c. 6. which is the firſt ſtatute of amendment, the authority of 8. *Co.* 156. *b.* was urged by him. Want of entry of *a continuance* amended, and ſo of *miſ-entry of eſſoin* by a clerk (*a*). A *diſcontinuance* amended, and that muſt have been by common law; for the ſtatute of 14. *Edw.* 3. c. 6. is only for amendments of *a letter* or *a ſyllable*, and the Judges were ſo ſcrupulous, that they doubted whether they could amend *a word* by it (*b*). In the reign of *Henry the Sixth* a writ of *habeas corpus* was amended (*c*).

(*a*) Year Book 22. *Edw.* 3. c. 10.
(*b*) Year Book 29. *Edw.* 3. pl. 32.
(*c*) Year Book 4. *Hen.* 6. pl. 16. Era. Abr. "Amendment," 32.

And

And the Book ſays, that ſuch amendments may be, eſpecially in caſe of the king *(a)*. It is true, people of late have conceited, that nothing is amendable in *criminal proceedings*, becauſe, ſay they, they are excepted out of the ſtatute, as if nothing were amendable at common law; but in many caſes at common law, the king could amend where the ſubject could not; as if *quare impedit*, at the king's ſuit, be "*præſentere*" inſtead of "*præſentare*," it is amendable, though in an *original*: but beſides, this is a matter within the expreſs words of the ſtatute of 8. *Hen.* 6. c. 12. ſ. 1. This is all in the ſame Term: while THE RECORD is wholly in the breaſt of the Court, and is relative to matter of the ſame Term; and I know nothing but what is amendable in the ſame Term; for in 8. *Co.* 156. *b.* it is ſaid, that at common law the Judges may amend their judgment, as well as any other part of the record in the ſame Term; and we are upon a miſpriſion of an officer of the court, who is to make up his record, or iſſue proceſs according to the act of the Court, which is right, and which he had before him, and that in the very Term in which it is committed. We are not endeavouring to amend the *teſte* of *an original writ* which comes out of another court, but the *teſte* of *a judicial writ*, according to the award of the Court; and no ſtatute of amendment is againſt us in this. The words of 8. *Hen.* 6. c. 12. are very comprehenſive, and would take in all *criminal matters* whatſoever, as well as *civil*, if there had been no exception in it; otherwiſe the exception had been vain; therefore what is not forepriſed by the exception, is within the general words of the ſtatute; and the exception expreſſes only * "*indictments* and *appeals* of *treaſon* or *felony*, and "*outlawries* of the ſame:" and the ſtatute of 14. *Edw.* 3. c. 6. makes no diſtinction between criminal and civil cauſes. It may be the ſtatute of 32. *Hen.* 8. c. 1. does not extend to any pleas of the crown, becauſe it mentions party and party, which in decency cannot be applied to the king *(b)*. And he relied very much on *Harris's Caſe* (*c*); which was an indictment for a nuiſance at the ſeſſions, and *not guilty* pleaded, and the *clerk of aſſize*, who ought to have joined iſſue for the king, omitted it, and the matter being tried and found againſt the defendant, this was moved in arreſt of judgment, and yet, after ſeveral years, the Court ordered it to be amended. In the caſe of *Parker v. Curzon* (*d*), an information for recuſancy was filed againſt huſband and wife, for the recuſancy of the wife, and the entry was, "*ea* "*præd.* the BARON and FEME *veniunt*; *et præd.* the FEME "*dicit quod ipſa non eſt inde culpabilis*; *et de hoc ponit ſe ſuper* "*patriam*;" and this was likewiſe amended after verdict by the docket of the officer, it being a manifeſt miſpriſion of the clerk; and yet this was a clear *diſcontinuance*, for there was no plea, and this amendment was in another Term. In *Sir John Aſtley's Caſe* (*e*), in a *quo warranto* the defendant diſclaimed ſpecially, that is, the diſclaimer in *the paper-book* was ſo, and the entry on

Poſt. 287.

* [270]

(*a*) Fitz. Abr. "Amendment," 9. 12.
(*b*) 2. Hawk. P. C. ch. 23. ſ. 129.
(*c*) Cro. Jac. 503.
(*d*) Cro. Jac. 529.
(*e*) Cro. Car. 144.

THE QUEEN *against* TUTCHIN.

THE ROLL was of a disclaimer general, and a year afterwards this was amended, as the Court said, at common law, being only misprision of the clerk in copying *the paper book* before him, which was right (*a*). Upon an indictment, the *venire facias* was directed *vicecomitibus Cantuar.* and the return was only by one, there being in truth but one *sheriff of Canterbury*, and this was set right (*b*), by making an entry on the back that there was but one sheriff; and this was said to be an amendment at common law, without the help of any statute, and likewise that it might well be by the statute of 8. *Hen.* 6. c. 12. which does not extend to *informations* at all, or, if to any, not to informations at common law, as this is: so he concluded, that this was amendable at common law, being in the king's case; or if not for that, yet that it might be by reason of misprision of the clerk in the same Term; or if neither, that it was within the purview of 8. *Hen.* 6. c. 12. and not forepriſed by the exception.

Post. 273. 306.

THE ATTORNEY GENERAL *ad idem.* This is a case of great concern; for if none of the statutes of *Amendments* or *Jeofails* extend to cases of THE CROWN, certainly it imports much to know what is amendable in crown cases by common law. The preamble of 37. *Hen.* 8. c. 3. takes notice of the inconvenience of having judgment stayed upon such nice exceptions; and he agreed, that statute could not be thought to extend to crown causes, because of the words "demandant and tenant" in the statute; but from that he inferred, that the crown causes did not stand in need of it; for it would sound very harsh for the subject's causes to be taken care of, and that the king's case, in matters of equal mischief, should pass unregarded. The law gives great privileges and prerogatives to suits of the king which the subject has not: a demurrer to * evidence shall not be in the case of the queen, without the consent of her Counsel; otherwise in the case of a subject (*c*). The queen after demurrer joined may waive it, and come to issue (*d*). Before judgment, in the queen's case, no *discontinuance* can vitiate (*e*); nor can discontinuance be alledged before judgment, for until then, even in the case of a subject, it may be amended at the pleasure of the Court; but not after judgment in another Term (*f*). Want of form in the king's writ shall be amended, otherwise in the case of a subject (*g*). An original at common law is amendable in the king's case, but not in the case of a subject (*h*). And this is further manifest by every day's experience; for the queen shall amend her information before issue joined, and this she may do even in informations for perjury, which is a most infamous crime; and this by common right of the crown at common law (*i*), and more than a subject can do in his action. Such amendments

* [271]

1. Cro. 347.
3. Vent. 17. 28.

(*a*) Now by 9. *Anne*, c. 20. ſ. 7. the statute for the amendment of the law, and all the statutes of Jeofails, are extended to informations in the nature of *quo warranto*.
(*b*) 1. Sid. 344.
(*c*)
(*d*) 5. Co.
(*e*) Hardres, 504.
(*f*) Cro. Jac. 211.
(*g*) Year Book 4. *Hen.* 6. pl. 28. Fitz. Abr. "Amendment," pl. 22.
(*h*) 8. Co. 156.
(*i*) See Rex v. Wilkes, 4. Burr. 2569. and Rex v. Holland, 4. Term Rep. 457.

as we preſs for were always allowed, where it could not turn to the prejudice of the party. But he agreed, that an amendment which would alter the defence of the party, or any way turn to his prejudice, ought not to be; but ſaid, that this is no ſuch, for the party had a right day on THE ROLL, and appeared and took his trial at that day (*a*). *A capias* is amendable in the king's caſe, becauſe it is no prejudice to the party; but an *exigent* is not, becauſe he would be thereby prejudiced, *viz.* outlawed; but this caſe ſtands clear of all exceptions of prejudice. Then as to THE EXCEPTION itſelf: Though it may ſeem by the award on THE ROLL that *the writ* ought to bear *teſte* the ſame day, yet there appears no reaſon to make it abſolutely neceſſary that it ſhould be ſo, and there are no authorities that the law requires it. And by the reaſon of the thing it ſeems it may be otherwiſe; for the *venire facias* is returnable all the twenty-third, and may be returned at any time on that day, and the Court may ſit all that day, and peradventure the clerk has not time enough after the award to make out a writ until the next day, and if ſo, they ought to *teſte* it according to the truth the next day. It is true, there is reaſon that it ſhould be made out and *teſted* in a reaſonable time after, that the jury may have time to appear, and the party timely notice to prepare for his trial; but not that it ſhould be abſolutely neceſſary it ſhould be *teſted* on the return of the *venire facias* (*b*). Upon a writ of error brought, if the plaintiff do not aſſign error, and ſue out a *ſcire facias* againſt the defendant, *ad audiendum errores*, of the ſame Term of which the record is, all is *diſcontinued*, but it is not ſaid, that he muſt do it at the return of the writ (*c*). All that is neceſſary at the return of the writ is, that the ſame day be given to the jury and parties, but not that the proceſs againſt the jury be *teſted* on that day (*d*). A *habeas corpora juratorum* ſhall have the ſame day that the parties have, that is, it ſhall be continued to that day; but the *teſte* need not be on that day. The jury and party are continued over to a day certain by the award on THE ROLL; * and I do not know any caſe that makes it neceſſary that the *teſte* ſhould be on the ſame day with the *return* of the firſt writ, but that in *Yelv.* 204. and in *Cro. Jac.* 203. and that is in an appeal which is upon another reaſon; for in an appeal, if there be any mean time between *the return* of one proceſs and the *teſte* of another, as in that caſe there were ſeven days, all the proceſs is diſcontinued; but that is upon a ſpecial reaſon, that of being in appeal, where the proceedings have always been very ſtrict, and by the common law all appeals were to be carried by freſh purſuit; and ſo it was until the *ſtatute of Glouceſter*, which gives them a year and a day, within which it muſt be brought; and in an appeal he cannot imparl, and if he do it is *a diſcontinuance*; and this is the only authority I can find, except in *Cro. El.* 572. where it is taken notice of that the proceſs bore *teſte* on the day after the return of the *venire facias*, and the exception is taken to other matter on the

* [272]

Vide Cro. El. 453. 572.

(*a*) Year Book 20. *Hen.* 6. pl. 18.
(*b*) Tab. N. B. 20. Brook's Abr. "Diſcontinuance," 59.
(*c*) Year Book 22. *Edw.* 4. pl. 20.
(*d*) Vide Brook. Abr. "Diſcon. de Proceſs," pl. 53.

THE QUEEN *against* TUTCHIN.

record, yet this was not mentioned as a fault, or amended. Beſides, the courſe of THE CROWN OFFICE has gone ſometimes this way and ſometimes another way, and due weight will be laid upon the courſe of a court. However, if it be amiſs, it ought to be ſet right, and that by the courſe of the common law, without the help of any ſtatute; for it is the miſpriſion of the clerk of the court, which in ſtrictneſs is the act of the Court in the ſame Term, and by conſequence within the power of the Court. And beſides, the crown without doubt has the benefit of the *ſtatute of Amendments* in many caſes, and great authorities are ſo: the ſtatute 14. *Edw.* 3. c. 6. has no excluſive words in it, and I ſee no reaſon why it ſhould not extend to crown cauſes, for there is nothing in the ſtatute that may lead to ſuch a conſtruction. The ſtatute of 32. *Hen.* 8. c. 1. I agree, does not extend to it, for the reaſon before mentioned; but that of 16. & 17. *Car.* 2. c. 8. is very general and extenſive, without any thing in it to exclude crown cauſes; and the general words of the ſtatute of 36. *Edw.* 3. c. 15. for entry of pleas in *Latin*, and pleading in *Engliſh*, extends to pleas of the crown, therefore *à pari*; and my LORD HALE, for whoſe opinion all profeſſors of the law have a great veneration, was of opinion in my *Lord Fitz-Walter's Caſe* of a *quo warranto*, that where the writ iſſued to ſheriffs, there being but one, that miſtake was amendable by the ſtatute of 16. & 17. *Car.* 2. c. 8. It is true, it went off upon another point, *viz.* that it appeared the jury had thrown dice for their verdict; but upon ſeveral motions, HALE abided by his opinion, that it was amendable. The caſe of *King v. Read* (*a*), and *Blackmore's Caſe* (*b*), throughout are, that in all caſes where the words of the ſtatute are not "between party and party," the general words will reach to crown cauſes if they be not excepted, and this is not excepted by the ſtatute of 8. *Hen.* 6. c. 12. the words whereof are as comprehenſive and expreſs as can be for us: that ſtatute indeed does not extend to all pleas of the crown, as to appeals, indictments of treaſon or felony, and proceſs thereupon, becauſe they are excepted by expreſs words; but to all other it does. * In *Dyer*, 346, 347. an information is amended in a ſtronger caſe than this: It was in an information *qui tam* for uſury, and the party brought in by *ſubpœna*, and appeared by attorney, and pleaded not guilty; and this taken for an exception, and yet, after debate, judgment was given for the plaintiff "*propter ſtat. de Jeof.*" as the Book ſays. Much of the common courſe of this court ſeems to be upon this ground and reaſon, that pleas of the crown are amendable either by common law, or by the ſtatute, as the practice of amending records removed by *certiorari* by THE ROLL below. But in this caſe, taking it for granted that the *diſtringas* ought to bear *teſte* on the return of the *venire facias*, What do we deſire to amend? Only *a letter*, or *a ſyllable*, or rather *a tittle*; for the date is in *Latin* figures "XXIIII." and to ſtrike out the laſt ſtroke is what we deſire; a thing within the expreſs words of 14. *Edw.* 3. c. 6. in the caſe of a ſubject; and the ſtatute makes no difference between that and caſes of the crown. Greater amendments than this have been

a. Cro. 526.

* [273]

10. *Edw.* 3. 20.
1. Sid. 148. 259.

(*a*) 1. Sid. 49. 66. 217.

(*b*) 8. Co. 156.

at

at the common law; and *Lord Coke* says, that of late days, without doubt, there were amendments at common law. We put it upon the other side to shew, that there was any diversity between crown causes and those of subjects, except it were that crown causes were amended where subjects' causes could not be; and if they do not shew any such authority, then all the authorities for amendments in civil causes are *à fortiori* in criminal causes. *Lord Coke* says, that at common law a variance in any part of the record from the original is amendable; so the Judges may amend their own judgment, as also any part of the record in the same Term, but a misprision of the clerk in process was not amendable in another Term; so it was his opinion, that it could be done at any time in the same Term; but he might go a little further, and say, it might be at any time before judgment; for all the old books are so. Now the reason of that rule extends to all criminal causes as well as civil. If a fine be set in court on the first day of Term, it may, by common law, be mitigated or discharged at any time during the Term. In *Trinity Term*, in the seventh year of *William the Third*, in the case of *The King v. Walcott*, a writ of error was brought to reverse an attainder of treason, and a necessary part of the judgment being omitted, the reversal was actually pronounced and entered on the roll; but the Court finding that there were precedents and forms of entries to the contrary, they ordered the judgment to be struck out again the same Term, and to be put in the paper to be argued; and the process of the court, as well as their judgment, is in the breast of the Court all the same Term. A second instance of this practice is, that all misprisions of the *clerk of assize*, or *justices of peace*, in certifying the indictment in the caption, may be amended the same Term it comes in. If an indictment be vicious in the caption, the Court by common law may amend it the same Term it comes in, 1. *Sid.* 259. *The King v. Glover.* The coroner was ordered to attend, and to amend an inquisition returned hither, *Cro. Car.* 276. An indictment upon the statute of 8. *Hen.* 6. c. 9. of Forcible Entries, laid the inquisition to have been taken * *apud* S. *coram* A. *et* B. *justiciar. pacis in partibus præd.*; and there being three divisions in the county, and three several commissions for them, exception was taken that it did not appear for which of them "*A.* and *B.*" were justices; and this was held a fatal exception. But it has been ruled (*a*), that if the certificate of the clerk of assize be faulty by his misprision, they will amend it by the roll below. In *Samson's Case* (*b*), Error was brought to reverse an indictment of murder; the certificate of the clerk of assize was wrong, for want of a continuance; and one of the Judges would have it amended at common law, for the great mischief that would otherwise ensue; but JONES, *Justice*, was against it, except the king did specially desire it.

THE QUEEN *against* TUTCHIN.

8. Co. 56.

8. Co. 56.

Vide 1. Vent. 132. in another Term.

1. Cro. 251. 1. Vent. 69. Raym. 186. 4. Mod. 395. Parliam. Cases, 225.

1. Saund. 200.

* [274]

(*a*) Stafford's Case, 1. Jones. (*b*) 1. Roll. Abr. 196.

And

THE QUEEN *againſt* TUTCHIN.

And *per* HOLT, *Chief Juſtice*, That muſt be by *ſpecial mandate*.

But there two Judges were againſt JONES, *Juſtice*, for its being amended. An amendment was made of an indictment, according to a precedent in *Edward the Fourth's* time (*a*). Before the ſtatute 7. *Edw.* 4. 15. of Amendments, civil and criminal matters were amended. He quoted the Year Book of *Edward the Third* (*b*), where an entry of eſſoin was amended (*c*). An entry of voucher to warranty has been amended (*d*). The record of a judgment is in the breaſt of the Court all the ſame Term (*e*), and all proceſs until judgment (*f*). Default of proceſs is amendable at any time before judgment (*g*). After iſſue joined, there was a *diſtringas*, and no award of *tales* on Skinner, 46, &c. the roll, and there being a *tales* on the back of the writ, it was amended (*h*). The record was, that ſuch a one, "*gentleman*," and in the NISI PRIUS ROLL, "*gentleman*" was omitted, and it was amended, and all by the common law (*i*). In the caſe of *Bond v. Devys* (*k*), on the *venire facias*, *S. Sutton* was returned, and the *diſtringas* was ſo, but the panel returned was *D. Sutton*, and that *variance* was moved in arreſt of judgment; but upon examination, it was found to be only a miſpriſion of the ſheriff's clerk, and therefore amendable by common law, without the aid of the ſtatute of 8. *Hen.* 6. c. 12. In treſpaſs (*l*) to the damage of one hundred pounds, the record of *niſi prius* was one hundred ſhillings, and there was a verdict for a hundred pounds; and this miſtake was amended as a miſpriſion of the clerk, and there the Judge of *niſi prius* had no more warrant to try that iſſue than is in our caſe. In *Brooke* (*m*) and *Fitzherbert* (*n*) are amendments, all at common law. Things of the ſame nature with this were amended at common law (*o*); and the ſtatute makes no alteration againſt us, but where it is expreſsly ſo (*p*). There are not in THE YEAR BOOKS many inſtances of criminal proceedings, and that is a great argument that theſe niceties have not crept into the law in criminal matters; for if they had, ſomething of them would be found. Then if there were amendments at common law, why ſhall there not be ſome in informations? There are multitudes of amendments of this nature in civil caſes. The caſe of *Tuſton v. Aſhley* (*q*), is of an amendment at common law even in another Term, which could be, as is there held; and ſure it is in the power of the Court to do right to THE QUEEN, as well as to THE SUBJECT. And he quoted my

(*a*) 7. *Edw.* 4. pl. 15. Palm. 480.
(*b*) 4. *Edw.* 3. fol. 9. b
(*c*) Year Book 5. *Edw.* 3. pl. 25.
(*d*) 3. Lev. 420.
(*e*) See 1. Bac. Abr. 80.
(*f*) Year Book 9. *Edw.* 4. pl. 3. Abridg. by Brooke, "Amendment," 46.
(*g*) Year Book 7. *Hen.* 6. pl. 27.
(*h*) Fitz. Abr. "Amendment," 32. Brook. Abr. "Diſcontinuance," 15. 13. Fitz. Abr. "Amendment," 13. 15 16, 17. The Year Book 22 *Edw.* 3. pl. 19. Brook. Abr. "Amendment," 105.
(*i*)
(*k*) Cro Car 563.
(*l*) Fitz Abr. "Amendment," 26, 17. Bro. abr. "Amendment," 17.
(*m*) Bro. Abr. "Amendment," 26. 29.
(*n*) Fitz. Abr. "Amendment," 16. 55.
(*o*) Year Book 2 *Rich.* 3. pl. 11. Bro. Abr. "Amendment," 87.
(*p*) Bro. Abr. "Amendment," 22. 59.
(*q*) Cro. Car. 144.

Lord

*Lord Macclesfield's Case (a): A rule was made to reverse an attainder of high treason, about sixteen years before, upon writ of error, and no entry thereof, or any record made up, no continuance or assignment of error, and yet, to reverse this attainder, leave was given to make up the record now (b); and if this help was given to a subject, Why should not the like be in the queen's case (c)? And there it was said to be a default in the officer of the court, and that was in some respect the default of the Court; therefore he was ordered to do that now which then he ought to have done: so here it is to make your officer do what he ought to have done before. The case of *The Queen v. the Warden of the Fleet* (d) was much stronger than this; for there a *venire facias*, upon issue joined in chancery, was returned hither the fourth of *February*, and the record itself did not come in until the seventh, and the officer marked it to have come in on the very day on which it came in truth, and the Court ordered the matter of fact to be examined, in order, that if it should appear that the record had come in on the fourth, it should be set right, but it appearing not to have come in until the seventh, they could not amend it, being a discontinuance, but upon writ of error before the lords, that judgment was reversed for this reason, for that the clerk might have entered it as of the fourth, though in truth it came in after.

But HOLT, *Chief Justice*, said, that matter was not set right in the king's bench to this day; for they looked upon it to be against their duty as Judges to enter a record against truth.

LASTLY,—THE ATTORNEY GENERAL said, that the making a writ different from THE ROLL was only the misprision of the clerk (e).

BROTHERICK *contra*, first, took a difference between the suit of the king in a civil prosecution of his right, and a prosecution against a subject for a crime. In the first case, he has greater favour than the subject; in the other, the strictest nicety is to be kept to. Upon this difference he distinguished the case of *quo warranto* from the present case, as likewise that of the *Warden of the Fleet*; for they are to be looked on as prosecutions for the king's civil right. He agreed, that there were some amendments at the common law; but said, that if there were amendments in all the instances put by them, there would be little use of the *statute of Jeofails* or of *Amendments*. He denied that any criminal proceedings were amendable by the statute of 8. *Hen.* 6. c. 12. or the 16. & 17. *Car.* 2. c. 2.; and no authority of any such amendments is quoted, except in *Dyer* (f); and *Roll* (g) takes notice of the case in *Dyer*, and says, it was held not amendable in the twenty-second year of *Queen Elizabeth*. And *Coke*, in the middle of *Blackmore's Case*, says, that the statute

(a) 1. Ld. Raym. 16.
(b) See Lord Mohun's Case, ante.
(c) See Wilkes' Case, 4. Burr. 2569.
(d) 3. Mod. 335.
(e) See Cro. Eliz. 467. 1. Roll. Abr. 200. that it is out of Term, or on a *Sunday*, is the writ of the clerk.
(f) Dyer, 346.
(g) 1. Roll. Rep. 447.

did

THE QUEEN *against* TUTCHIN.

did not extend to criminal proceedings. *Cro. Car.* 312. ſays, that the *ſtatute of Jeofails* does not extend to pleas of the crown. A wrong *venue* is fatal in a *quo warranto*, *Style*, 307. In a ſuit * upon the *ſtatute of Inmates*, a *diſtringas* bore *teſte* out of Term, and it was not amended; and a *venire facias de novo* was awarded. See alſo 3. *Keb.* 485. the opinion of HALE, ſo much relied on of the other ſide. In 1. *Vent.* 17. 35. an information for forgery at common law was denied to be amended. In *Hardres*, 217. an information was brought upon the *ſtatute of Navigation*, for importing certain ſpices of the growth of *Aſia*, *Africa*, or *America*, from *Holland* beyond the ſeas, and an exception was taken, that it was not ſaid that *Holland* was not in *Aſia*, *Africa*, or *America*, and held fatal, though after verdict. He agreed, that records which come hither by *certiorari*, if variant from THE ROLL below, ſhall be amended by it. The caſe of the writ directed to two ſheriffs when there was but one, was amended by having an indorſement made on the back of the writ that there was but one ſheriff in fact; and it was an amendment by the common law, according to a precedent in 5. *Hen.* 7. where a writ was directed *coronatoribus* (*a*). But it is ſaid, that there is no neceſſity it ſhould be *teſted* on the day of the return of *venire facias*; but that is expreſsly againſt the caſe in *Yelverton* before put. This is not like the *Caſe of Walcott* (*b*); for that was an alteration of the judgment of the Court, which is not complete until the laſt day of Term; nor is it like my *Lord Macclesfield's Caſe* (*c*), for doubtleſs the Court may ſupply loſt records, or put things in the ſtate they have been in before, or make their officer do that which he ought to have done; but this is to alter what he has done. A *venire facias* returnable at a day different from the award of the Court, and trial thereupon, is not amendable (*d*). An information was brought on a penal ſtatute, and the *venire facias* on the roll awarded was "*coram nobis ubicunq.*" and that *venire facias* made out was "*coram nobis*," without more; and judgment ſtayed thereupon (*e*).

[276]

HOLT, *Chief Juſtice*. The caſe of the *Warden of the Fleet* was a civil action, and no criminal proſecution; but merely a civil courſe to entitle the king to an office forfeited to him.

MOUNTAGUE having had time given him to anſwer, argued it ſolemnly.—This point, as it is of concern to THE CROWN, ſo it is of high importance to THE SUBJECT; for it is to make a precedent that will be leading in the like caſes. Again, actions *qui tam*, which in ſome reſpects are between ſubject and ſubject, have been always excepted out of the *ſtatute of Jeofails*; therefore, *à fortiori*, actions of higher nature are ſo. The *teſte* of this writ is not amendable at common law; though I agree many amendments were at common law. No authority has been quoted that error in the *teſte* of a writ is amendable at common law.

See Carth. 70. 76. 157. 172, &c. Skinner, 46. 253. &c. 11. Mod. 230. 333.

(*a*) 1. Keb. 900, 901.
(*b*)
(*c*) 1. Ld. Ray. 16.
(*d*) By POPHAM, *Chief Juſtice*, in the caſe of Rogers v. Bird, Cro. Eliz. 572.
(*e*) 1. Roll. Abr. 201. Yelv. 60.

Lord

Lord Coke (*a*) ſays, that Judges may amend their own judgment in the ſame Term, or any other part of the record; but it does not from thence follow, neither does he ſay, that they may amend faults in writs iſſued * out of their record to an officer *in pais*, or returns made by him. And the reaſon why they may amend their own judgments and continuances, which are the only inſtances given there, is, becauſe they are their own proper acts, which, as it is there ſaid by my *Lord Coke*, remain in their breaſts in the ſame Term; but the act of another in purſuance of their award cannot be ſaid to be their act, and a writ made out to an officer cannot be ſaid to be in the breaſt of the Court. If the entry of the clerk of the award of the Court had been different, there might be ſome colour to amend THE ROLL; but this is not ſo: you will take notice that the writ ought to be according to your award, and that it is not ſo is the fault of the officer, not of the Court. All their authorities out of THE YEAR BOOKS are between party and party, and not like this; nor within the ſtatute; the words of 14. *Edw.* 3. c. 6. are very large, and yet there is not one authority of amendment of crown cauſes by that ſtatute: and *Coke* (*b*) holds, that the ſtatute does not extend to pleas of the crown; and this he ſays generally, without ſaying that it is becauſe they are excepted, as he ſays, upon the ſtatute of 8. *Hen.* 6. c. 12. in that caſe; and this ſtatute of 14. *Edw.* 3. c. 6. has no exception; and yet by the opinion of that Book, the words of it do not comprehend pleas of the crown: and what can be the reaſon that the general words of this ſtatute do not extend to pleas of the crown, as it has been acquieſced in ever ſince, but the great indulgence that is given to the ſubject in criminal matters? It may be objected, that the crown's not being relieved by the ſtatute, is a ſign that it did not want it. In the caſe of *Beecher v. Shirley* (*c*) it is held, that there can be no *diſcontinuance* in crown cauſes until judgment; but thoſe caſes extend only to what we agree, that the acts of the Court are in their breaſt before judgment; and ſo is 3. *Lev.* 430. and COKE's *Note*, that the ſtatute did not extend to pleas of the crown, would be impertinent, if that were ſo that they did not need it. As to the ſtatute of 8. *Hen.* 6. c. 12. which has an exception of "appeals, of indictments of treaſon and felony, and outlawries on "the ſame," from whence it is ſtrongly urged, that it extends to our caſe, becauſe it is not excepted; I anſwer, Firſt, That the words of it are not more comprehenſive than thoſe of 14. *Edw.* 3. c. 6.; that of 8. *Hen.* 6. c. 12. is all miſpriſion of clerk in *writ*, the other is all miſpriſion in *proceſs*, ſo they are co-extenſive, and the exception, we ſay, is only *ex abundanti cautelâ* of ſome ſcrupulous law-maker, or but mentioned for inſtances to ſhew they meant not it ſhould extend to pleas of the crown. Many eſtates-tail are not mentioned in the particulars inſtanced by the ſtatute *de Donis*; and ſo are many offices not within the enumeration of particulars

[277]

(*a*) 8. Co. 156. c 157. a.
(*b*) 8. Co. 57. b.
(*c*) Cro. Jac. 212.—See alſo Hardres, 504.

in

THE QUEEN against TUTCHIN.

in the ſtatute of 5. & 6. *Edw.* 6. c. 16. againſt ſelling of offices; ſo ſince the proceedings of all the time, ever ſince the making of theſe, have gone againſt the notion of amending of crown cauſes, it will be hard to begin now. * And this *variance* of the roll from the *teſte* cannot be thought the ſlip of the clerk. Indeed, if the day certain on which the writ ought to bear *teſte* were entered on THE ROLL, then it might be a miſpriſion of the clerk not to imitate what was ſet before him; but that being not ſo, it was the neſcience of the clerk that he did not know, but it would do well to have it *teſted* at any ſubſequent time; and faults through neſcience of the clerk are not amendable. Amendments here would quite alter the writ, and make it quite another writ, as much as the twenty-fourth differs from the twenty-third; and that ſuch amendment would be like the alteration made by *Juſtice Ingram*, whereof mention is made in 2. *Ro.* 3. 10. *a.* for which he was fined eight hundred marks.

* [278]

Vide poſt. 286. & *ſede.*

But PER CURIAM, That alteration was made extra-judicially and clandeſtinely, and that made the crime of it.

250. And HE relied on *Gage's Caſe* in *Co. Entries* and in *More*, and *Child v. Harvey, Mich.* 11. *Will.* 3. where, on a *ſcire facias* upon a record out of chancery, iſſue was joined, and a *niſi prius* was on the very day of the return of the writ.

But PER CURIAM, That could not be ſet right, becauſe the trial was actually had before the return of the writ.

And HE quoted the opinion of *Noy*, in *Cro. Car.* 144. that none of the ſtatutes extended to the king's caſe.

PARKER *on the ſame ſide.* As to records removed hither by *certiorari* the ſame Term they come in, to have them amended, the truth is ſo; for when a record is removed hither by *certiorari*, by intendment of law the very record is brought hither; but if it appear to the Court not to be rightly entered, they will do it, becauſe all the Term it is in their breaſt: but it is not like writs iſſuing out and coming in the ſame Term, for there it is otherwiſe; for as to records coming by *certiorari*, the Term is but one day, and the Court are not abſolutely poſſeſſed of it until that day be out; but as to writs, the Term has ſeveral returns and days in it. Here the fact is, that the writ was really made out at a day after the twenty-third, and *teſted* according to the truth on that day; and to make it *teſted* againſt this, would be to go againſt the truth. And we ſay, that the writ ought in law to appear to have been made out *in præſentiâ partium*; and the command of the Court is not by the entry on THE ROLL, but by the writ. If indeed it had been made out at a day after, and *teſted* of the return of the *venue*, it would have been intended to have been well, and made out at the time it bears *teſte*. And he ſaid, the difference in crown cauſes was between a ſuit for the king's civil right, which is favoured, and criminal proſecutions, which are *ſtricti juris*. He took another diverſity, in point of amendment of writs on which nothing is done

done, and writs executed; as if on a *capias* nothing be done, but *non est inventus* returned, that may be amended, when if the party were taken upon it it would be otherwise; and for this diversity he relied on the opinion of POPHAM, in the case of *Rogers v. Bird* (*a*); a *venire facias* was rightly awarded, and made out (through mistake) wrong, and *per* POPHAM, if a trial had been upon it, it should * not be amended. *Vide* 34. *Hen.* 6. 2. *Br.* "*Am.*" *pl.* 10. 3. If a juror be returned upon a *habeas corpora* different from *venire facias*, it is not amendable. And there is another diversity where the thing is really done well; as if the *venire facias* be of one person, and he is really sworn, but by another name, this is amendable. *Vide* 28. *Hen.* 6. 3. 2. *Sid.* 12. *Palm.* 490. 1. *Ro. Ab.* 196.

THE QUEEN *against* TUTCHIN.

* [279]

POWYS, *Serjeant, by way of replication.* As to diversity between the king's civil right and criminal prosecution, they quote no case where it is taken; and if the king have that great favour in the prosecution of his civil right, for that it concerns the revenues of the crown, in which the public have an interest, *à fortiori* it ought to be in prosecutions for crimes which is for the administration of justice, and in which the subject, *viz.* the public, have the highest concern that they should not go unpunished, especially where the offender loses no legal advantage, nor receives any real prejudice by it. It is admitted, that all acts of the Court, even the highest and most transcendent, are amendable in the same Term; *à fortiori* then should the slip of a clerk in pursuing the warrant of the Court be so too, that likewise being a matter no way prejudicial to the offender. If a writ original, when a fault is discovered therein, shall be sent into chancery, to have this mistake of a clerk there amended by that court, Why shall not this Court in like manner amend the mistake of their clerk in a writ issuing out here? Great endeavours have been used to exclude this case out of the benefit of the two acts of parliament, for that the general notion has been, that those statutes do not extend to criminal causes or proceedings; but sure the opinion of my LORD VAUGHAN, in his case of *collateral warranty*, is very reasonable, "That ancient "interpretations ought to be followed; but that, on the other "hand, a thousand resolutions against the express words of an act "of parliament ought not to prevail." And the words of the statute of 8. *Hen.* 6. c. 12. are very expressive and general, "All, "&c." and the exception very particular.

Quære and *vide ib.* 170. and 327.

Vid. 1. Jo. 423, 424.

THE ATTORNEY GENERAL. Sure the diversity between civil and criminal prosecutions of the crown, as to the point of legal favour, is very groundless; for we all know, that by the common law a criminal was not to have a copy of his indictment, or Counsel to plead for him, which is now remedied in case of treason (*b*); and before, and even now in all cases of felony, the defendant has no other opportunity of defending himself but merely upon the fact, *guilty* or *not guilty*. It is odd to say, that if THE ROLL on the

(*a*) Cro. Eliz. 572.

(*b*) See 7. *Will.* 3. c. 3. and 7. *Ann.* c. 21. *s.* 11.

award

THE QUEEN *againſt* TUTCHIN.

award had been wrong, it might be amended as the act of the Court; and that the ſlip of the clerk in purſuance of the award of the Court, which is right, ſhall not be amended; that is, that when there is nothing to amend * by, it ſhall be amended; and not when there is a good foundation to amend by. It is not true to ſay, that there is no more reaſon to bring pleas of the crown within the ſtatute of 8. *Hen.* 6. c. 12. than within that of 14. *Edw.* 3. c. 6.; for that 14. *Edw.* 3. c. 6. has the word "party" in it, which may have been the reaſon why it has not been conſtrued to extend to crown cauſes; but there is no ſuch word in the ſtatute of 8. *Hen.* 6. c. 12. and *Coke* ſeems ſtrongly of this opinion in *Blackmore's Caſe* (*a*); for he ſays generally, "that "14. *Edw.* 4. c. 6. does not extend to crown cauſes;" but when he talks of that of 8. *Hen.* 6. c. 12. he ſays; "that ſtatute "extends not to crown cauſes." Why? Becauſe they are excepted. But it is objected, that we contend againſt the current opinion in all ages, and we agree it was generally taken ſo, though no direct authority be in the caſe; and there are not many authorities expreſs, even upon the ſtatute of *Jeofails*. And ſuch general received opinion upon a matter never ſolemnly adjudged is of no great weight; for it was a common opinion ever ſince the making of the ſtatute 32. *Hen.* 8. c. 34. concerning actions by aſſignees of a reverſion, that it did not extend to an aſſignee of a copyholder. And though there be a caſe in *Yelverton* (*b*) agreeable to that opinion, yet about twelve years ago, when it came thoroughly to be conſidered, it was held (*c*), that that ſtatute did extend to copyholds. Some opinions ſudden, and paſſing *ſub ſilentio*, ought not to be of any great conſideration. I do agree that this is a caſe of great conſequence; but what is the conſequence? Whether an offender ſhall go unpuniſhed? and ſure criminals are no: the favourites of the law. There is, indeed, favour where life is in queſtion, but none in caſe of inferior offences; and it is more for the honour of juſtice and law that criminals ſhould be puniſhed, than eſcape upon ſuch niceties: but however, all this muſt ſtand upon the law, and everybody is to have juſtice. As to 2. *Cro.* 211. where it is *obiter* ſaid, that the *ſtatute of Jeofails* ſhall not extend to the crown, except it be expreſly named, that is, directly againſt a known and true rule in law, upon conſtruction that general words of an act of parliament for furtherance of juſtice, or ſuppreſſing of wrong, ſhall bind the king. And in the caſe in *Style*, 304. which was a ſuit upon the ſtatute of *Inmates*, and a *diſtringas teſted* on *Sunday*, and the queſtion, Whether it was amendable by 18. *Eliz.* c. 14. or 21. *Jac.* 1. c. 13.? and held not; but no mention was made of 8. *Hen.* 6. c. 12. And *Yel.* 60. was an information upon a penal ſtatute, and the rule was of a ſudden, "let judg-"ment ſtay;" but that is not to be underſtood any final determination; and beſides, that is excepted by the ſubſequent ſtatutes,

* [280]

R. ſtat. 29. *Car.* 2. c. 3. ſect. 2. i. *e.* of Frauds. Poſt. 281.

(*a*) 2. Co. 156.
(*b*) Appleton *v.* Doyley, Yelv. 135 Brafier *v.* Beale, Yelv. 222. S. C. Cro. Jac. 305.
(*c*) 4. Mod. 80. Bull. Ni. P. 761, 3. Term Rep. 398.

And

And to say that this is no miſpriſion, but forgetfulneſs, which is ſcience, *quia omnis ſcientia eſt reminiſcentia, ideo omnis ignorantia eſt oblivio.* We ſay, that all defect through want of due care or diligence is a miſpriſion; and ſo is 8. *Co.* 160. *b.* if a clerk embezzle the record voluntarily, or ſuffer it to be defaced by accidents, or through want of care, it is a miſpriſion. And the amendment in *Siderfin*, by ſuggeſtion on THE ROLL of a fact otherwiſe out of their * notice, is much more than we deſire here: and a *quo warranto* is not a civil proſecution for *ouſter* of the franchiſe; for ſuppoſe the defendant diſclaim in the franchiſe, yet he muſt further anſwer the uſurpation; and if it be found againſt him, he ſhall be fined. THE QUEEN *againſt* TUTCHIN. * [281]

HOLT, *Chief Juſtice.* The caſe of *Rex v. Sherrington Talbot (a)* does not come up to this caſe: that was an amendment for the ſubject, and in a civil caſe. And ſure if in a *quo warranto* a ſubject make a limited *diſclaimer*, and the clerk enter it a general one, this ought to be amended; and on the other ſide, if an original indictment be right, and the clerk enter it wrong on THE PLEA-ROLL, it ſhall be amended *(b)*. And *Harris's Caſe (c)* is a very ſhrewd caſe. In capital matters there never is a complete iſſue joined, but *de hoc ponit ſe ſuper patriam*, but in other criminal caſes it is otherwiſe *(d)*; and the *Caſe of Sir John Curzon (e)* is a ſtrong caſe too. Indeed, this is a caſe of great conſequence; and it has been the general received opinion, that the *ſtatutes of Jeofails*, or *Amendments*, do not extend to pleas of the crown, and great regard is to be had to that; and it is true, at the judgment of the caſe in *Style*, 304. no mention was made of the ſtatute of 8. *Hen.* 6. c. 12. and that is rather an argument that it was clearly conceived it would not help them, than that it was not thought of; for there were very learned men then at the bar: and the reaſon of the late judgment in the caſe of an action brought by the aſſignee of a copyholder, was founded upon the rule taken in 3. *Co.* .. that the general words of an act of parliament ſhall extend to a copyhold eſtate, where it is for the benefit of the tenant, and not to the prejudice of the lord. Ante, 280.

THE COURT having taken time to conſider until the laſt day of this Term, and THE ATTORNEY GENERAL now preſſing for their reſolution, they argued *ſeriatim* thus; after declaring that they could wiſh for longer time, not that they were unſettled in their opinions, but to digeſt and methodize their reaſons to greater ſatisfaction,

GOULD, *Juſtice.* I hold it amendable at the common law; for otherwiſe, what mean all the amendments in indictments and informations quoted by MR. ATTORNEY? For the purpoſe, that of 2. *Rolle* 35. and the caſe there quoted by one of the Judges:

(a) Cro. Car. 321.
(b) Cro. Car. 144.
(c) Cro. Jac. 504.
(d) See Rex v. Dowlin, 5. Term Rep. 313.
(e) Cro. Jac. 529.

THE QUEEN *ag. inſt* TUTCHIN.

Two were indicted for felony, and found guilty; the Judge who tried them found the indictment was in the ſingular number, and therefore ſtayed the judgment; and afterwards upon conſideration, by the opinion of the ten Judges, it was amended, and the men hanged; and, I ſay, that muſt have been by the common law. *Vide Raymond*, 440. And I take it, that faults which do not alter the iſſue or trial may be amended; and he relied on *Sir John Curſon's Caſe* (*a*), and *Godfrey's Caſe* (*b*), and the caſe of *Sherrington Talbot* (*c*): and indeed, if it were not for the caſe of *Bradley v. Banks* (*d*), I ſhould think it well enough, and a good continuance; for the twenty-third all day the defendant may be in court, and the very firſt minute of the twenty-fourth here is proceſs iſſued out; and the caſe of *Bradley v. Banks*, as it is in *Cr. Jac.* (*e*), does not at all contradict this opinion.

* [282] * POWYS, *Juſtice, accord.* FIRST, This is an information perfectly at common law, and not upon any penal ſtatute. It has obtained, that the *ſtatutes of Jeofails* extend not to any crown caſes, becauſe they have an exception of all indictments and informations upon penal ſtatutes; and it is a common notion, that no crown matters ſhall be amended by any *ſtatute of Amendment*; but it ſeems very odd to make ſuch an interpretation upon the ſtatute of 8. *Hen.* 6 c. 12. for the purview of that ſtatute is as expreſs and general as can be, and the exception but particular; therefore to extend it to things of an inferior nature is very wonderful to me. In the *Lord Bridgwater's Caſe* (*f*), my LORD HALE thought the ſtatute of 8. *Hen.* 6. c. 12. was not to be ſo reſtrained; but that the exception was an excellent key to open the meaning of it, that is, to amend whatever comes within the generality of the purview, and is not excepted by it: and he was of opinion, that crown cauſes did want, and in many caſes ought to have, the help of the *ſtatutes of Amendments* and *Jeofails*; but the reſt inclined againſt him. And my LORD COKE ſaying, "That 8. *Hen.* 6. c. 12. "extends not to informations in crown cauſes, becauſe they are "excepted," and we finding upon a peruſal of the ſtatute that they are not excepted, make the reaſon run quite another way; and I believe ſuch opinions as are againſt me have been conceived upon the credit of that ſaying of *Coke*, without any further examination; and though the king be not named within the purview, yet his being named within the exception ſhews the law-makers underſtood, that without the exception it would extend even to all crown cauſes. However, in regard to the opinions againſt me upon the ſtatute, I do not go upon the ſtatute, but hold it amendable at common law. And much, I think, may be ſaid upon the reaſon of the thing, that it is very well as it is. The return is on the twenty-third, and ſo is the award, and the writ iſſues on the twenty-fourth, ſo that there is no interval of time or chaſm be-

(*a*) Parker v. Curzon, Cro. Jac. 529.
(*b*) 1. Sid. 243.
(*c*) Cro. Car. 311.
(*d*) Yelv. 204. 1. Bulſt. 141.
(*e*) Cro. Jac. 283.
(*f*)

tween

ween the one and the other, but the minute the one leaves it the other takes it up. The words of the award are, "*Præceptum eſt* '*quod diſtringat*;" and that regards futurity, and cannot be on the twenty-third, becauſe that would be to diſtrain them before any default in them; for they have all the twenty-third to appear, and the next day without interruption continues the proceſs. As to the caſe of *Bradley v. Banks*, as it is in *Cro. Jac.* it does not contradict this opinion, but ſeems rather to favour it; for there notice is only taken of the gap between the *teſte* of a *capias* and *the return* of *the original* in an appeal, which was ſeven or eight days: and though *Yelverton* ſays further, that *the exigent* bore *teſte* the day after the return of the *capias*, which was ill, yet *Croke*, taking notice only of the great diſtance of time between *the return* of *the original* and the *teſte* of the *capias*, ſeems as if he had conceived that the Court had grounded their opinion upon that, and that this is amendable at common law; and ſurely there are much bolder amendments even in capital matters. We are to conſider that this is but the miſpriſion of the clerk in proceſs, and that in an offence of an inferior nature; and if there have been greater amendments in capitals, I think this may be well amended (*a*). * In an information for perjury, the *venire facias* was "*J. S.*" without addition, and by conſequence muſt be *J. S.* ſenior, and the *diſtringas* was *J. S.* junior, quite another perſon, and it was amended (*b*), for that this is the miſpriſion of the clerk (*c*). So this being an information at common law, and there being amendments at common law, and this being a miſpriſion of the clerk, the award of the Court being right, I HOLD that it ought to be amended.

* [283]

POWELL, *Juſtice, contra.* This is a caſe of great conſequence. THE FIRST queſtion is, Whether this be a fault at all? THE SECOND, If it be, Whether it be amendable at common law, or by the two ſtatutes of Amendments of 14. *Edw.* 3. c. 6. or 8. *Hen.* 6. c. 12.? for the other ſtatutes are of *Jeofails*, and not of *Amendments*. This is *a diſcontinuance* at common law; for all proceſſes muſt be continued from the very time of the award of the Court; and the authority of the caſe of *Bradley v. Banks*, and the reaſon of it is ſo. The reaſon is, becauſe it is *a diſcontinuance*, and not becauſe it is *an appeal*, in which there muſt be *freſh purſuit*, as the Judges ſaid; but it muſt be becauſe it is *a diſcontinuance*, in all caſes at common law; *à fortiori* it will be ſo in an *appeal* in which *freſh purſuit* is required; and the ſaying of the Judges is ſo to be underſtood. It is true, THE ROLL is rightly continued, but the proceſs to the jury is diſcontinued. In the reign of *Edward the Fourth* (*d*), the defendant at the day was eſſoined to *quinden. Paſch.* there muſt be an *idem dies* to the other; but that could not be given to the jury, but they muſt be continued by *habeas corpora*, and that on the very return of the *venire facias*; and this caſe is not right in *Brooke*. It is true, ſince the *ſtatute of Jeofails* theſe things

(*a*) For inſtances of common law amendments, ſee 1. Sid. 243. 66. 1. Keb. 191. 255.

(*b*)

(*c*) 1. Roll. Abr. 201. Cro. Eliz. 572.

(*d*) Year Book 21. *Edw.* 4. pl. 20.

THE QUEEN *against* TYTCHIN.

have not been kept up to; but at common law there must be a chain of proceſs againſt the jury, as well as in caſe of other continuances; and to ſay, that the *twenty-fourth* is a continuance of the *twenty-third* is what I cannot for my life comprehend, no more than that the *twenty-ſixth* can be of the *twenty-third*. Then if it can be amended by 8. *Hen.* 6. c. 12. the words whereof are very general, and the exception of few particulars of the higheſt nature; and upon full conſideration, I think it cannot; for I cannot imagine that all the Judges and ſages of the law ever ſince would rather, in caſes of this kind, rely upon the common law, than upon this ſtatute, except they had taken it clearly that the ſtatute did not reach to it; and the reaſon of that ſeems to be from the ſtatute of 14. *Edw.* 3. c. 6. the words whereof are general, but mention the word "*party*," which was a good reaſon to exclude *the king*: and of that opinion is COKE, in *Blackmore's Caſe*, VIZ. that the ſtatute extends not to pleas of the crown. It is true, the ſtatute of 14. *Edw.* 3. c. 6. extended only to proceſs out of THE ROLL, that is, writs that iſſue out of the record, and not to proceedings in the roll itſelf; and for that 8. *Hen.* 6. c. 12. was made to enlarge the remedy of 14. *Edw.* 3. c. 6. to proceſs in the plea roll, &c. which ſtatute, in my opinion, being made in enlargement of 14. *Edw.* 3. c. 6. but not as to the parties that ſhall receive the remedy, but to what matters more that remedy * ſhall extend: and the words "chal-
* [284]
"lenge of party" in the ſtatute 14. *Edw.* 3. c. 6. ſhall explain the ſtatute 8. *Hen.* 6. c. 12.; and it is no new thing for one law to be conſtrued in purſuance and imitation of a former law: and thus I hold the exception in 8. *Hen.* 6. c. 12. is *ex abundanti cautelâ*; and that without, no plea of the crown had been within that ſtatute; and that reaſon which reaches the *ſtatute of Jeofails*, will have, I own, nothing to do with this matter. The firſt of them is that of 32. *Hen.* 8. c. 30. the words are, "between party and
Vide ante, 4, 5. and 269. 8. Co. 156. b.
"party;" and ſoon after they would not extend it to proceedings between *demandant* and *vouchee*, becauſe *the vouchee* is not an original party. The exception of the ſubſequent ſtatute does not extend to *informations* at common law: and my LORD HALE, in my *Lord Bridgewater's Caſe*, held, that ſuch informations were within the purview; but I never knew any principal judgment of that kind; and I rather think that the firſt *ſtatute of Jeofails* extending only to party and party ſhall interpret all the reſt to be ſo too: and ſo it was upon the ſtatute relating to leaſes by biſhops and eccleſiaſtical perſons, for they are a chain of law relating to the ſame matter. This is a fault in the *teſte* of *a writ*. The *teſte* of *an original* is ſo material, that it is not amendable; and that was *Gage's Caſe*. And lately in a caſe in the houſe of lords, between the *Lords Pembroke and Jerſey*, the ſame was held by all the Judges; but this is the *teſte* of a judicial writ. It has been doubted, in *Cro. El.* 820. whether the *teſte* of a *venire facias* or *diſtringas* were amendable, and a difference taken by the Court between a *teſte* and *return* of thoſe writs; for there being no day named in the award of the Court for the *teſte*, and there being
always

always a day certain for *the return*, the variance of the *teſte* was held the neſcience of the clerk, and therefore not amendable: but notwithſtanding, ſince, they have amended the *teſte* as out of Term, after the return, or on *Sunday*; but this writ here is good in itſelf, though not to this purpoſe: and yet I think if it were in a civil cauſe it ſhould be amended by the award on THE ROLL, eſpecially the clerk having declared to us upon examination, that it was the writ he intended in purſuance of THE ROLL. And there are authorities to amend the writ even when it is a good writ, but not to the purpoſe, to adapt it to the matter, *Yelv.* 64. So though this be not in itſelf a naughty writ, yet if upon examination of the clerk it appeared through miſtake in him not to be *ad idem*, we would amend it by 8. *Hen.* 6. c. 12. in a civil matter. But whether this be amendable at common law? There were amendments at common law, if it be called *an amendment*, that the Court could alter their judgment in the ſame Term, though the record of it were made up; but there though it be entered on THE ROLL, yet THE ROLL in the ſame Term is not *the record*, but it remains in the breaſt of the Judges: but in another Term THE PLEA-ROLL is *the record*. And my *Lord Coke* ſays, that the miſtake of the clerk in proceſs ſhall not be amended in another Term: but I think that muſt be underſtood of proceſs in THE ROLL, and not of proceſs iſſuing out of THE ROLL: as the caſe of 29. *Hen.* 6. the award was with a *diſtringas* and an *octo tales*, and the entry of a *diſtringas* generally, and * all this being in the ſame Term, the Court ſaid, This is a miſtake of the clerks, for we remember that we have awarded a *diſtringas* with an *octo tales*, and order an amendment: but the making out a proceſs out of THE ROLL is otherwiſe; for it never was otherwiſe in the breaſt of the Court, than that they awarded it; and the clerk's wrong purſuing their the award in making out a writ with an ill *teſte*, though in the ſame Term, is not amendable; nor do I find any caſe at common law where the amendments were of miſtakes of the clerk in iſſuing of proceſs, but their miſtakes in entering the acts of the Court, or of the Court in entering *continuances*, may be amended the ſame Term, or at any time after; and ſo is the caſe of *Chambers v. More*, now in *Levinz* (a). And as to amendments of *criminal matters* at common law, I cannot agree with many of them, as *Harris's Caſe* (b) for one; ſo of the caſe in *Palmer* (c), *Plomb's Caſe*, where they ſupplied *ad tom. meum* in an outlawry, for we every day reverſe outlawries for that fault; and the caſe cited by YELVERTON, in *Bulſtrode* (d), is ſo ſhortly put, that it does not appear in what the ſingular number is put for the plural; but if it were in a material part of the indictment, it were hard to amend it: and as to the *Caſe of Sir John Curſon* (e), it may be well; for the iſſue there was well entered in a docket, but ill on THE PLEA-ROLL, and no more than a miſtake of entering THE

THE QUEEN *againſt* TUTCHIN.

Vide ante, 263. Poſt. 286. 320.

See Rex v. Ponſonby, 1. Wilſ. 303.

* [285]

5. Mod. 394.

(a) 3. Lev. 430.
(b) Cro. Jac. 502.
(c) Palmer, 430.
(d) 2. Bulſt. 35.
(e) Cro. Jac. 529.

THE QUEEN *againſt* TUTCHIN.

PLEA-ROLL according to *the docket*, which warranted a right iſſue: and as to the caſe of *The King v. Reed*, as it is in *Keble* (*a*), the Court were of different opinions about it: A *venire facias* was againſt twenty-four, whereof *J. S.* was one, and a *diſtringas* of *J. S.* junior, and the cauſe tried by twelve, of which *J. S.* was not one; and KELYNGE ſaid, it was amendable: ANOTHER would have it only an explication of the *venire*; and ANOTHER held it amendable by the *ſtatute of Jeofails*, becauſe not within the exception; but I do not find any judgment that it was amended; but at laſt it was looked upon to be no *diſcontinuance*. And he agreed, that whatever was amendable in civil caſes at common law would be ſo in criminal matters, but that this would not be amended in civil caſes at common law, and therefore not here.

HOLT, *Chief Juſtice*, *accordant*. It is not amendable. This is an omiſſion in a point material, *viz.* in the *teſte*, which by law ſhould have been the *twenty-third*, and not the *twenty-fourth*, for the twenty-third is the day which the defendant has in court upon the *venire facias*; and therefore the writ giving further day ſhould have iſſued on that day. It is objected, that there is no interval between the *twenty-fourth* and the *twenty-third*. I anſwer, that if one is to appear on the *twenty-third*, and appears, and receives no direction on that day from the Court when he ſhall come again, upon the expiration of the *twenty-third* he is out of court. Shall you then give him a day behind his back? Here indeed he has a day on THE ROLL, but the writ againſt the jury iſſues at a day after, when the party and they are out of court; ſo it is a writ awarded behind the party's back, and without warrant of the Court; for the warrant of the Court is "*die Lunæ poſt tres Mich.*" * and then a precept is awarded to the ſheriff to diſtrain, and this precept iſſues on the next day; and is this warranted by THE ROLL? No ſure; therefore, being another writ than what the Court has awarded, it is no authority to diſtrain the jury, and then they had none to try the cauſe; for here is a material *variance* between the writ awarded, and that by which the jury were diſtrained; the one is the *twenty-third*, the other on the *twenty-fourth*, and the day of the writ is always the day of its *teſte* in judgment of law: and he quoted the caſe of *Owen v. Baily* (*b*), in the ſeventeenth year of *Charles the Second:* One recovered damages in *trover*; the defendant afterwards ſold his goods *bona fide*; the plaintiff took out a *fieri facias teſted* on the firſt day of *Trinity Term*, which was before the ſale, but taken out after; and it was held, that the goods in the hands of vendee were bound by it. By this amendment we ſhould make this quite another writ; for a writ iſſuing on the *twenty-fourth* cannot be the writ awarded on the *twenty-third*. Suppoſe this were now immediately after the ſtatute of 8. *Hen.* 6. c. 12. and before any *ſtatute of Jeofail*, Why ſhould this be amended? It is a *good writ* in itſelf, and the meaning of that ſtatute was to amend *bad writs*, and not to alter a good writ, ſo as to adapt it to a particular purpoſe. Now to make this a good trial, you would have us alter this writ that is very good in itſelf, and, even contrary to truth,

* [286]

Vide 1. Cro. 278. 375. 1. Jo. 302.

Ante, 263. Poſt. 310.

(*a*) (*b*) Comb. 483.

make

make it a writ of the *twenty-third* of *October*, ſo to alter the very nature and ſubſtance of it. Now this being *a diſcontinuance of proceſs* in a civil caſe was helped by the ſtatute of 32. *Hen.* 8. c. 30. and ſince it is not material whether it be amended or not, becauſe the fault is cured by that ſtatute, there is no ſuch amendment as this between the time of 8. *Hen.* 6. c. 12. and 32. *Hen.* 8. c. 30. It is true, the *teſte* of writs have been amended; but when? When it was on *Sunday*, out of Term, or after the return, which is impoſſible to be, and therefore a plain miſtake of the clerk; and upon the ſame reaſon is the caſe in *Yelv.* 64. for there the *diſtringas* bore *teſte* the ſame day with the *venire facias*, ſo that the *teſte* was directly repugnant to the purport of the writ itſelf, which was to diſtrain the jury ſummoned on the *venire facias*, when in truth no jury could be ſummoned. I always have taken it, that if upon the return of one writ another be awarded, that that other ſhould bear *teſte* of the return of the firſt writ: and the caſe of *Bradley v. Banks* is very ſtrong in that point, and the common practice of the common pleas is ſo, though it be not ſo much obſerved here in writs of inquiry of damages: the one proceſs there is always *teſted* on the day of the return of the laſt; whether it be a *capias* in outlawry, or a *diſtreſs infinite*, the one muſt be *teſted* on the return of the other, or elſe all is diſcontinued. Aye, but this is a miſtake of the clerk; but we are to judge, whether it be not a miſtake in point of ſkill: Who can tell? Every clerk does not know; and ſome pretend that it need not be *teſted* on the day of the award: Why then ſhall we look upon this to be a fault in point of computation rather than that he thought it good? And if it be neſcience in the clerk, it is not helped even by the ſtatute of 8. *Hen.* 6. c. 12. though a civil caſe before the *ſtatute of Jeofails*.

THE QUEEN *againſt* TUTCHIN.

See Carth. 76. 172. 367. 506. 520.

AND HE HELD that a new *venire* muſt go, for a new *diſtringas* would not do; for the firſt *venire facias* is executed; and the jury have now tried the defendant, * and that appears on record here, and the now *venire facias* is *ipſo facto* diſcharged, only an entry to be made on THE ROLL, *quia apparet Cur.* that the *diſtringas* did not iſſue until the twenty-fourth. *Ideo conſideratum eſt quod caſſetur*, and *venire facias de novo* awarded.

Ante, 278. See Skinner, 46. 253, 254. 591. Carth. 70. 76. 172. 652, &c.

* [287]

NOTE, POWYS, *Juſtice*, recanted *inſtanter*, and GOULD, *Juſtice*, *hæſitabat*.

The Pariſh of St. Clements *againſt* The Pariſh of St. Andrew, Holborn.

Caſe 383.

AN APPEAL by one pariſh from an order of juſtices for the removal of a poor perſon from the other pariſh to them. At the beginning of the ſeſſions the order was confirmed; and afterwards at the ſame ſeſſions, another order was made for the reverſal of the original order.

The ſeſſions may vacate an order made in the ſame ſeſſions.

S. C. Salk. 606. Ante, 87. 163. 269.

A writ of *certiorari* being now brought, the order of confirmation, and alſo the order of reverſal, were both returned.

ET PER CURIAM —FIRST, The judgment of the juſtices is in their breaſt, and alterable by them all the ſame ſeſſions.

If the ſeſſions make an order directly contrary to an order before made in the ſame ſeſſions, the laſt order ſhall prevail, although there be no expreſs words of repeal in it.

1. Jones, 330. Cro. Car. 341. 350. Salk. 496. 524. 534. Stra. 6. Ld. Ray. 394. 425. 2. Mod. 72. 10. Cc. 101.

SECONDLY, If they make a ſubſequent order directly contrary to a former of the ſame ſeſſions in the ſame cauſe, the ſubſequent one is an abſolute repeal of the former, being inconſiſtent with it, though there be no expreſs words of repeal in the ſecond order: as if at THE OLD BAILEY, &c. one indicted of felony will not plead, and judgment of *peine fort et dure* be given againſt him (*a*), and he is carried away, and the next day he alters his mind, he ſhall be admitted to plead; and if he be convicted, he ſhall have judgment to be hanged, which is a *ſuperſedeas* or ſetting aſide of the firſt judgment.

POWELL, *Juſtice*, ſaid, if there be two acts of parliament directly contrary one to another the ſame ſeſſions, the laſt ſhould only be taken for law (*b*).

HOLT, *Chief Juſtice*. If they both ſhould generally refer to the ſame ſeſſions, I do not know which to take for law. And he quoted a caſe of the *town of Colcheſter* here ſome years ago exactly like this; and for that the ſecond order did not expreſsly repeal the firſt order, and that the juſtices did return them both as orders, the ſecond order was quaſhed, and the firſt ſet up. And THE CHIEF JUSTICE put a caſe that was in chancery a day or two before, which was this: An appeal from a decree of THE MASTER OF THE ROLLS; and the queſtion was, Whether new evidence that had ariſen between the ſaid hearing and decree, and the appeal, ſhould be received? And it was held by THE LORD KEEPER, by POWELL, *Juſtice*, and HOLT, *Chief Juſtice*, that all the matter at THE ROLLS had fallen to the ground upon the appeal, and it was now the ſame thing as if nothing had ever been done in it, and by conſequence the new evidence ought to be admitted.

But at laſt the matter here was referred by conſent to the three Judges, or any two of them, to arbitrate.

(*a*) Now by 12. *Geo.* 3. c. 20. in felony and piracy the judgment ſhall be the ſame on ſtanding mute as if the priſoner had confeſſed the indictment.

(*b*) See Rex v. Cator, 4. Burr. 2026.; Rex v. Davis, Caſes Cro. Law, 228.

Caſe 384.

* Booth *againſt* Booth.

If judgment be ſigned under an agreement to ſtay execution for a year, execution may, after the year, be taken out without a *ſcire facias*; but not if the ſtay be only for *three months*, and the execution afterwards hindered by *injunction*.—S. C. 1. Salk. 322. 5. Co. 88. 1. Salk 258. 3. Mod. 187. 189. Ante, 14. 136. 212. Poſt. 292. 296. 2. Lem. 77. Carth. 2. Rep. Eject. 154. Stra. 100. 301. 3. Peer. Wms. 36. 4. Com. Dig. "Execution" (I. 4.). 5. Com. Dig. "Pleader" (3. L. 4.).

JUDGMENT, with an agreement to ſtay execution for three months, within which time the defendant obtained an injunction in chancery againſt the plaintiff, ſo that he could not take out execution until after a year, and then he took out an *elegit* without a *ſcire facias*, and had it executed.

The doubt was, Whether the execution was not irregular.

POWYS,

Booth *againſt* Booth.

Powys, *Serjeant*, and Cowper, argued, that it was not. If the *ceſſet executio* were for a year after the judgment, yet the plaintiff within the next year might take out execution without a *ſcire facias*. (*Quod fuit conceſſum.*) So if the defendant bring a writ of error, and hang up the plaintiff for a year, and then is nonſuit, he may take out an execution without a *ſcire facias*. So here, if, before the time of the agreement be out, the defendant tie us up by his own act, ſo as we dare not take out execution within the time, ſhall he take advantage of his own wrong, by putting us in a worſe condition?

Per Curiam. This practice is againſt a manifeſt rule of law, to take out execution after the year without a *ſcire facias*, and we cannot take notice of your chancery injunctions. Beſides, it had been no breach of ſuch an injunction to take out a writ of execution within the time, which might have ſaved the trouble of a *ſcire facias* after the year, by entering the continuance down by a *vic. non miſit breve*; but that we cannot ſuffer to be done now, a writ not being taken out in due time; and if we ſhould let this judgment ſtand, it would be an erroneous one, and therefore reverſible by writ of error.

Therefore let a *ſuperſedeas* go, *quia improvidè emanavit* (*a*).

Note, That there never is a *ceſſet executio* entered on the roll.

(*a*) See Winter *v.* Lightbound: The plaintiff obtained a judgment of Michaelmas Term generally, but was ſtopped from taking out execution by an injunction out of chancery, which being afterwards diſſolved, he took out execution *teſted* the laſt day of the ſubſequent Michaelmas Term, without ſuing out a *ſcire facias*; and the whole Court held the execution irregular, becauſe taken out after the year had expired without a *ſcire facias*, 1 Strange, 301. But in the caſe of Michell *v* Cue and his Wife, where on an execution ſued out, without a *ſcire facias*, above a year after the judgment had been obtained, it appeared that the whole delay had ariſen on the part of the defendants, by obtaining injunctions in chancery, and time for payment, the Court were unanimouſly of opinion, that the execution was well taken out, for that the rule, "that a judgment above a year old muſt "be revived by *ſcire facias* before execu-"tion can be taken out on it," was intended to prevent the defendant being ſurprized, and ought not to be taken advantage of by thoſe who cauſe the whole delay, 2. Burr. 660.

The Queen *againſt* Collingwood.

Caſe 385.

To *perſuade* an apprentice to embezzle his maſter's goods is an indictable offence; but the indictment muſt poſitively aver, that he did take away the goods Ante, 99. 182.

It was an indictment, and conceived thus: "*Jurat. &c.* "*præſentant, quod* T. C. *nuper, &c. exiſtens perſona malæ* "*diſpoſitionis ac non intendens victum ſuum per labores honeſtos* "*quærere, ſed machinans et intendens ſervientes et apprenticios* "*honeſtorum civium et inhabitant. civ.* London. *in moribus et ſtatu* "*ſuis prægravare et deſtruere, ipſe præd.* T. C. *viceſimo die* "*Martii, anno, &c. et diverſis aliis diebus tunc antea, apud* "London, *viz. in paroch.* S. B. *in warda de* D. London. in conſequence of ſuch perſuaſion.—S. C. 3. Salk. 42. S. C. 2. Ld. Ray. 1116. 1. Salk. 380. 12. Mod. 195.

"*præd.*

THE QUEEN against COLLINGWOOD

"*præd. quendam* C. S. *ſervientem et apprenticium cujuſdam* R. T. "*de* LONDON, warehouſe-keeper, *illicitè, injuſtè, et nequiter* "*movit, ſeduxit, et allexit, ſexcent. ſeptuagint. duas virgatas panni* "*lanei*, VOCAT. callamancoes, *valor. vi. lib. de bonis et catallis* "*præfat.* R. T. *extra præd. domum et ſhopam ipſius* R. *illicitè,* "*injuſtè, et nequiter capere et aſportare. Et quod præd.* T. C. "*dicto xx. die, &c. anno, &c. ſupradict. et diverſis* * *aliis diebus* "*et vicibus, bona et catalla præd. à præd.* C. S. *ſervient. et* "*apprenticio præd.* R. T. *adtunc et ibidem apud dict. paroch.* "B. &c. *illicitè, injuſtè, et nequiter, cepit, recepit, habuit, et ad* "*uſum proprium ipſius* T. C. *convertit, eodem* T. C. *adtunc et* "*dictis aliis diebus et vicibus bene ſcient. præd.* C. S. *fore ſervient.* "*et apprenticium præfat.* R. T. *ad grave damnum ipſius* R. T. "*in malum exemplum omn. aliorum in conſimili caſu delinquentium,* "*contra pacem dominæ regin. nunc coron. et dignitatem ſuam.*"

* [289]

After conviction, ſeveral exceptions were taken by MONTAGUE:

2. Roll. Abr. 79. K. Keilway, 87.

FIRST, That it was not directly ſaid that the apprentice did actually take away the goods, but only that the defendant did intice him to take them away, and did receive them from him; which is a ſtrong argument indeed that they were taken away, but no direct poſitive charge, as the fact ought to be laid in an indictment. And for this he relied on the caſe of *The Queen v. Daniell* (*a*).

SECONDLY, It is not ſaid where the houſe and ſhop of *R. T.* is, and by conſequence no *venue* where the ſuppoſed taking by the apprentice was.

Ante, 99. 182. 1. Salk. 380. S. C.

PER CURIAM. The indictment in the caſe of *The Queen v. Daniell* went upon two points; the one was, for ſeducing an apprentice from his maſter; the other, for perſuading him to take away his goods. As to the firſt, which was the only point in judgment, we held the offence not indictable (*b*), and there was no *venue* laid for the ſecond.

2. Roll. Abr. 79. K.

AND THEY ALL WERE OF OPINION, that the charge ought to be direct, and not argumentative; and that it was not enough to lay an inticement, without an act done in purſuance of it. You ſhew here a ſpecial matter, *viz.* that the defendant received them, but do not ſhew that they were taken away; and if this were felony, as you here ſhew it, the defendant would only be *acceſſary*, and that could not be without a principal fact committed. Here indeed you might have charged him as *a principal*, for he who perſuades another to commit *a treſpaſs* is *a principal*, and the taking of the apprentice here is the taking of the defendant; but you do not ſhew where that was.

(*a*) Ante, 99. 101. 182.

(*b*) But an action of *treſpaſs* lies by a maſter for ſeducing his *journeyman* or other ſervant from his ſervice, Hart *v.* Aldridge, Cowp. 54.

And

And PER OMNES, It cannot be maintained. But THE COURT gave them time till next Term to ſee to maintain it (a). THE QUEEN *againſt* COLLINGWOOD

(a) Judgment was given for the defendant upon the firſt exception, 2. Ld. Ray. 1118. S. C. 3. Salk. 42.

* Clerk *againſt* Withers. Caſe 386.

THE CASE was thus: *F. Dives*, as adminiſtrator of *J. Dives*, recovered three hundred and three pounds againſt *Clerk*, upon a bond to his inteſtate, upon judgment by default in the common pleas, and ſued out a *fieri facias teſted* of *Trinity Term*, in the firſt year of *Queen Anne*, returnable *tres Mich.* directed to THE SHERIFFS OF LONDON, which was delivered to the ſheriff on the firſt of *Auguſt* in the ſame year. who, on the ſame firſt of *Auguſt*, ſeized goods to the value. *F. Dives*, the adminiſtrator, died on the ninth of *September* following. The ſheriff returned the ſeizure to the value, *ſed remanent, &c. pro defectu emptorum.* On the twenty-ninth of *September* the ſheriff was removed, and another put in. The plaintiff *Clerk* now ſued *ſcire facias* againſt the then ſheriff for reſtitution of his goods, and upon demurrer judgment was given againſt the plaintiff in the court of common pleas, and he brought a writ of error.

If *A.* obtain a judgment againſt *B.* and ſue out a *fieri facias*, on which the ſheriff takes the goods of *B.* in execution, the debt is diſcharged by ſuch ſeizure; and if *A.* die after ſuch ſeizure, and the ſheriff be removed before *the ſale*, the ſucceeding ſheriff may compel his predeceſſor to ſell them; and therefore *B.* cannot ſue out a *ſcire facias* againſt *him* to have reſtitution of the goods, for the death of *A.* does not abate the execution.

S. C. 1. Salk. 322.

And now, the caſe having been twice ſolemnly argued at the bar, THE COURT *ſeriatim* affirmed the judgment.

At the bar three points were inſiſted on for the plaintiff in error:

FIRST, That in this caſe the property remained ſtill in him.

SECONDLY, That his proper remedy was a *ſcire facias.*

THIRDLY, That the defendant's plea, *viz.* that he was bound to ſell the goods, and compellable ſo to do by a *diſtringas nuper vicecomitem*, was not a good plea.

And two things were ſaid to be conſiderable in THE FIRST POINT, *viz.* the death of the inteſtate's adminiſtrator before ſale, and likewiſe the removal of the ſheriff and his return. It is not to be controverted, but that if a man has judgment, and ſues out a *fieri facias*, and goods are ſeized, and then the plaintiff dies, the ſheriff is bound to ſell, and give the money to his executor or adminiſtrator; but here, as was urged, there is none that can ſue out proceſs to compel the ſheriff to ſell, or to perfect this inchoate execution, becauſe none is privy to the adminiſtrator; for his own executor cannot do it, becauſe it was *in auter droit*, and the adminiſtrators *de bonis non* are not privy to the plaintiff, but immediately from the firſt inteſtate: and for this reaſon it was, that ſuch an adminiſtrator could not, at common law, ſue execution upon a judgment obtained by the executor or adminiſtrator of his inteſtate (a); a miſchief which is remedied by the ſtatute of 17. *Car.* 2. c. 8: and now where an executor or adminiſtrator has judgment *after verdict*, and dies before execution ſued out, the adminiſtrator *de bonis non*

S. C. 11. Mod. 34. S. C. Hok, 303. 646. S. C. 2. Ld. Ray. 1072. Poſt. 291. 12. Mod. 604. Ld. Ray. 40. 244. 252. 1. Burr. 30. 1. Com. Dig. "Adminiſtration" (G.). 4. Com. Dig. "Execution" (C. 6). (C. 8.).

(a) See Yelv. 83. Cro. Jac. 4.

may

CLERE *againſt* WITHERS.

may ſue out execution; but that ſtatute extends not to this caſe, being *by default*. Beſides, that ſtatute enables them to revive ſuch judgment by *ſcire facias*, but takes no care to perfect executions commenced only, but not perfected. And the ſeizure by the ſheriff does not alter the nature of the debt, but it remains ſtill a *choſe in* * *action*, and of the nature of the bond on which the firſt ſuit was. And then it is as if no execution had been ſued; in which caſe the adminiſtrator *de bonis non* cannot ſue out execution, even by *ſcire facias* upon the ſtatute; therefore the property remains in the plaintiff. And if the ſheriff be not compellable to ſell by proceſs at the ſuit of this adminiſtrator, ſurely he cannot ſell at all; for it would be very odd to ſay, that it ſhall be at the election of the ſheriff whether he will ſell or not. This is not like the caſe of *Harriſon v. Bowden* (*a*), where an executor had judgment, and afterwards took out an *elegit*, and died inteſtate before the debt was levied, and it was held, that the adminiſtrator *de bonis non* ſhould have the benefit of it; for there was a complete execution, which ought not to determine by the death of the executor inteſtate; but here there was nothing complete, nor can the adminiſtrator take theſe goods in ſatisfaction of his debt. And none then has right to them but the plaintiff. An executor ſued *an extent* upon *a ſtatute ſtaple* (*b*), and the writ was returned "*ſerved*;" but the plaintiff died inteſtate before a *liberate* ſued out; and it was held *per Curiam*, againſt CROKE, *Juſtice*, that the adminiſtrator *de bonis non* could not proceed upon this execution, he being not privy to the executor who ſued out *the extent*: ſo in the principal caſe; and the like privity is neceſſary to have a *venditioni exponas* as to a *liberate*. The general property of the goods muſt continue in the defendant, for the ſheriff has it not; for by a grant of "all his goods" theſe would not paſs, nor would they be forfeited by a felony or outlawry of the ſheriff, as his own goods would be: and he only has a power to ſell them, as a commiſſioner of bankruptcy has to ſell the goods of the bankrupt, and his having them in poſſeſſion enlarges not his property (*c*). The property is not altered by the ſeizure (*d*); and if after the ſeizure the defendant had paid the money, he might have taken his goods again without any grant to be made by the ſheriff; and *trover* would lie againſt the ſheriff for detaining the goods after ſuch payment. Indeed, the ſpecial property may be in the ſheriff for his ſafety (*e*). He may bring *trover* for ſuch goods againſt a ſtranger (*f*), as a carrier may for goods given to him to carry (*g*); and the reaſon in both caſes is the ſame, *viz.* for their ſafety, they being both anſwerable over to the general owners (*h*). If goods in execution periſh without default of the ſheriff, it is the loſs of the defendant (*i*); which ſhews the property to be in him;

[291]

1. Cro. 208. 227. Cro. El. 319. 451. 457. 459. 639. 1. Co. 96. 2. Jo. 248. 386. Cro. Jac. 4. 194. Yel. 33.

2. Saund. 345. 1. Mod. 12.

(*a*) 1. Sid. 29.

(*b*) Cleve v. Vere, Cro. Car. 450. S. C. 2. Jones, 385.

(*c*)

(*d*) Dyer, 99.—See alſo Ayre v. Alden, Yelv. 44. S. C. Moor, 757.

(*e*) See 1. Vent. 52. 2. Saund. 47.

(*f*) Wilbraham v. Snow, 1. Mod. 30. S. C. 2. Saund. 47. S. C. 1. Sid. 438. S. C. 1. Lev. 282. S. C. 1. Vent. 52.

(*g*)

(*h*) See Holliday v. Camſel and White, 1. Term Rep. 658.

(*i*)

for

for if it were not, Why ſhould it be his loſs? And it was urged, that the party could be ſued *de novo* for this debt by the adminiſtrator *de bonis non*; and therefore he ought to have his goods again, that he may not be twice charged. The party is not diſcharged by the ſheriff's return, that he ſeized goods to the value; nor is the ſheriff by ſuch return chargeable, for the ſheriff has done but his duty (*a*). There will be no inconvenience in reſtoring thoſe goods, for here were laches on the other ſide, for they might have taken an aſſignment of the goods immediately upon the ſeizure. * And he quoted the caſe of *Ayre v. Alden* (*b*), that a ſheriff after amoval cannot ſell (*c*). And this is a very proper remedy for the plaintiff, for the ſheriff's return of ſeizure of the goods, and that *remanent pro defectu emptorum* is enough to ground a *ſcire facias* upon.

* [292]

Quod fuit conceſſum, if the execution were determined by the death of the party adminiſtrator.

RAYMOND *contra*. The defendant is diſcharged by this ſeizure to the value of the debt, and therefore there is no reaſon that he ſhould have his goods again. At common law his goods were ſo bound by the *teſte* of the *fieri facias*, that he could not afterwards alter the property of them (*d*); but now, as to a ſtranger, it has not that operation. In the caſe of *Smalcombe v. Croſſe*, in *Michaelmas Term*, in the ninth year of *William the Third* (*e*), there were two executions, one *teſted* before the other; the laſt was firſt delivered to the ſheriff; and it was held, that the ſheriff ought to execute that which was firſt delivered to him, but that if he execute the laſt the execution is good, and the party has his remedy againſt the ſheriff; but that as to the party himſelf, his goods are bound by the *teſte*. If the ſheriff ſeize to the value of the debt, the defendant is diſcharged (*f*), though the ſheriff do not ſatisfy the plaintiff; and the plaintiff cannot ſue out a new execution; for the ſheriff, by the ſeizure, becomes liable to him (*g*). If the ſheriff will not make a return, it is a contempt of the Court, for which they will deal with him (*h*); and if he return the truth, the proper remedy is a *diſtringas nuper vicecomitem* (*i*). By the caſe of *Wilbram v. Snow* (*k*), the ſheriff, after his office is determined, may ſell by a *venditioni exponas*. In *Thorowgood's Caſe* (*l*), execution was ſued out, and

1. Salk. 320. 323. Vide Mo. 402. Cro. El. 390. Cro. Car. 459. 487.

2. Saund. 47. 345. 1. Sid. 438. 1. Mod. 12. 40. 1. Vent. 52. 1. Lev. 282. 1. Mod. 12. 30. Poſt. 298. 1. Ro. 4.

(*a*) 2. Saund. 344.

(*b*) Yelv. 44. Moor, 757. 3. Roll. Abr. 894.

(*c*) But the whole Court were of a contrary opinion, and it was decided, in this caſe of Ayre *v.* Alden, as reported by *Croke*, that goods ſeized under a *fieri facias* may be ſold by the ſheriff after he is out of his office, without a *venditioni exponas*, Cro. Jac. 73.

(*d*) 1. Leon. 304. Cro. Eliz. 172.

(*e*) Comy. Rep. 34. S. C. 5. Mod. 376. S. C. Holt, 302. S. C. 12. Mod. 145. S. C. 1. Salk. 320. S. C. 3. Salk. 159. S. C. Carth. 419.—See alſo 2. Bac. Abr. 456. 4. Bac. Abr. 460. 3. Com. Dig. 308. Viner's Abr. "Execution" (A. 2.) pl. 18. (Q. a. 2.) pl. 14. "Time" (A. 3. pl. 6.). 1. Term Rep. 729. 4. Term Rep. 409.

(*f*) 2. Roll. Rep. 57.

(*g*) See ſame point Year-Book 20. *Hen.* 6. pl. 24.

(*h*)

(*i*) Year-Book 43 *Hen.* 3. 36. 2. Fitz. Abr. "Proceſs," 89.

(*k*) 2. Saund.

(*l*) Noy, 73.

goods

CLERK *gainſt* WITHERS.

goods ſeized after the party died, and it was doubted what ſhould be done with the goods, and ruled that they ſhould be brought into court. The ſheriff by ſeizure gains a property, and is anſwerable for *reſcous* and other caſualties. He may have *treſpaſs* againſt the party himſelf (*a*), and *trover* (*b*).

HOLT, *Chief Juſtice.* It is material who ought to have the goods; for if there be none who can make title to them by virtue of this execution, the firſt owner ought to have reſtitution: If this had been before the ſtatute 17. *Car.* 2. c. 8. he ſhould, it ſeems, have them back; ſo the doubt is, Whether he will bring this caſe within the equity of that ſtatute? The caſe of *Harriſon v. Bowden* (*c*) does not come up to this, for the lands were actually extended and delivered before the adminiſtrator died, and nothing more remained to be done; but the very having adminiſtration *de bonis non* veſts it in him. The queſtion here is, Whether the adminiſtrator *de bonis non* can purſue this inchoate execution by a *diſtringas nuper vicecomes*; and if he cannot do that, it will neceſſarily follow that there ought to be reſtitution. It is true, if goods, * to the value of the debt, be ſeized, though the writ be not returned, that diſcharges the defendant, unleſs the execution be afterwards avoided; ſo that the ſeizure, as long as it continues, is a ſufficient bar. Suppoſe then it cannot be carried on for want of privity, for he might have begun again before the ſtatute of 17. *Car.* 2. c. 8. if there had been a verdict, it might well be judged within the reaſon of that ſtatute. If the adminiſtrator had died before the ſeizure, would not the writ abate? If the ſheriff had ſold, and before payment the adminiſtrator had died, ſhall not the adminiſtrator *de bonis non* have debt againſt the ſheriff? Surely he ſhall; for now here is a new debt ariſes to the adminiſtrator, as he is adminiſtrator. It may be he has not privity enough to ſue proceſs; but he ſhall have debt, and compel the ſheriff to make a return in order to bring his action. If goods be taken on a *fieri facias*, and a *writ of error* is brought, and a *ſuperſedeas* come before ſale, yet the ſheriff ſhall ſell, *Dyer*, 99.; though 2. *Roll. Abr.* 291. be *contra*. After ſeizure, and a writ of error, and *ſuperſedeas*, a *venditioni exponas* ſhall go (*d*). If a ſheriff ſeize goods to the value, and return it, he is bound to find buyers, or elſe why ſhould a *diſtringas* go againſt him to ſell them to the value? for a *diſtringas* is a compulſory writ to ſell, at the value, upon pain of forfeiture of iſſue: and if he be ſo compellable to ſell, Why ſhould not debt lie againſt him? If goods be reſcued from a theriff, he is not liable (*e*); for it is not the *reſcous*, but *the return*, that makes him liable, that is, the return of ſeizing goods to the value; and therefore he ought to ſeize a convenient quantity to enable him to return a ſeizure to the value with ſafety; for the ſheriff, by his return, is charged to the value at all events, except by the act of God.

* [293]

1. Salk. 12. 318. 320. 322, 323. 2. Keb. 257.

1. Burr. 25.

POWELL, *Juſtice.* It is clear by THE YEAR BOOK of *Henry the Sixth* (*f*), that if a ſheriff return that he has goods in his hands for

(*a*) Cro. Eliz. 628.
(*b*) 1. Sid. 438. 1. Vent. 52. 2. Saund. 47.
(*c*) 5. Co. 90. Cro. Jac. 246.
(*d*) Smith v. Martin, 2. Saund. 400.
(*e*) 34 *Hen.* 6. pl.

want

want of buyers, and is afterwards amoved, a *diſtringas* ſhall go to the new ſheriff to diſtrain the old ſheriff to ſell the goods, and give him the money to bring it into court. If the goods were reſcued out of his hands, debt would lie againſt him; but if there be no default againſt him in not ſelling of the goods, it were hard if an action ſhould lie againſt him. It is true, by levying the goods, whether they be ſold or not, or a return be made or not, the defendant is diſcharged; for if a new debt be brought againſt him, he may plead that it was raiſed by *fieri facias*. And ſurely the property by the execution is out of the defendant, whoſe goods they were; but if by any accident the execution determine, he ſhall have them again: Who then has the general property in the *interim*? I cannot tell but it may be *in abeyance*. And he ſaid, that the return did not make him liable to debt. If this were after verdict, the ſtatute would have clearly helped it.

IN THE SECOND ARGUMENT, *for the plaintiff*, three things were urged:

FIRST, That debt after ſuch a return as here, would not lie by an adminiſtrator *de bonis non* againſt the ſheriff.

*SECONDLY, Not in any caſe. *[294]

THIRDLY, Though it were a *choſe in action* in right of the firſt inteſtate, yet in this caſe it would not be ſo.

FIRST, If the action did lie by the adminiſtrator *de bonis non*, it muſt be upon the ſeiſin and return of the ſheriff; but before the return was made, the adminiſtrator died, as appears by the record, and therefore the right of action never veſted in the firſt adminiſtrator; and, it never having veſted in any under whom he may derive it, it is not ſuch a *choſe in action* as he can take the advantage of.

SECONDLY, The ſheriff being a public officer, the Court will be tender of charging him with actions without an apparent default in him; for if he return *cepi corpus et paratum habeo*, and it appear to the Court that there is no default in him in not having him forthcoming, an action will not lie (*a*). And if a *ſcire facias* would not have lain upon a judgment by the adminiſtrator of an executor, or the adminiſtrator of another, *à fortiori* debt will not lie for him for want of privity (*b*). If a ſheriff return that he has levied the money, he ſhall not be excuſed from debt, becauſe he might have paid it over (*c*). Debt lies not againſt a ſheriff upon his return, when he does not miſbehave himſelf. It is a rule, that one ſhall never have an action for damages for a thing until he has a right to the thing itſelf. In the caſe of *Benſon v. Flower* (*d*), Money in the ſheriff's hands was aſſigned by commiſſioners of bankrupt, and held void, becauſe it was not the bankrupt's money; *à fortiori* in this caſe.

Vide 1. Sid. 29. 79. Hob. 10. 8. Co. 136. 1. Keb. 313. 1. Jo. 345. Cro. Car. 149, 150. 187. 200.

(*a*) Cro. Jac. 514. 2. Roll. Rep. 57.
(*b*) See 1. Sid. 407.
(*c*) 2. Saund. 247.
(*d*) Cro. Car. 176. 1. Jones, 215.

THIRDLY,

CLERK *against* WITHERS.

THIRDLY, The ſtatute of 17. *Car.* 2. c. 8. does not help this caſe. The rule upon equitable conſtruction of a ſtatute is, that whatever is within the reaſon and equity of a ſtatute, though it be not expreſſed, ſhall be adjudged within the remedy, as if actually expreſſed; as if ſeveral particulars be enumerated, and one of the like reaſon and miſchief omitted, it ſhall extend to it as much as if it had been expreſſed: and the 17. *Car.* 2. c. 8. is calculated to a particular purpoſe, that is, to give an adminiſtrator *de bonis non* an execution upon a judgment obtained by an executor or adminiſtrator, that is, to ſave him the benefit of the judgment, which generally is not obtained without great charges and delay; but it had no regard to executions commenced, *viz.* to ſave the benefit of them.

DEX *contra.* A writ of *fieri facias* or *capias ad ſatisfaciendum* needs no return to make it good, as an *elegit* does, becauſe an inquiſition is neceſſary to be taken in that proceſs, which is not ſo in the others (*a*). If goods be ſeized upon in the life-time of an adminiſtrator, who dies before ſale, the adminiſtrator *de bonis non* ſhall have advantage of that execution; but the Book does not ſay how (*b*). The ſheriff may and ought to ſell the goods without a *venditioni exponas* (*c*): beſides, there is nobody in court to inform them that the party is dead; and if ſo, the Court *ex officio* ought to award a *venditioni exponas* upon the return here made; that is, when the ſheriff informs the Court that he has commenced, but not perfected
* [295] the execution, * whether the Court will not command him to perfect it? An adminiſtrator *de bonis non* would have an action for a *falſe return* againſt the ſheriff (*d*); and *à fortiori* will it be in ſuch caſe where the ſheriff charges himſelf with a duty to the firſt teſtator; and that this general return does charge with a duty to the firſt teſtator appears from this, that after ſuch a return he cannot, upon *venditioni exponas*, return that he ſold for leſs. If indeed he had returned *a ſpecial ſeizure*, and mentioned the goods in particular, and they appear to be *bona peritura*, he may return upon the *venditioni exponas* that he ſold for leſs than the debt (*e*). And though the words "after verdict" be in the ſtatute of 17. *Car.* 2. c. 8. yet ſurely the ſtatute ſhall extend to other caſes than ſuch as are after verdict; as if the judgment be by confeſſion; and this is ſuch a miſchief as the makers of that ſtatute meant to avoid, as appears by the title and preamble thereof. And for equitable conſtructions he quoted 2. *Inſt.* 429. *Bro.* "*Bar*," 50. *Hale's Placitorum*, 23. *Dyer*, 186. Beſides, this writ is wrong in itſelf; for the ſheriff may and ought to ſell the goods without a *venditioni exponas*. All the writ ſuggeſts is, that he took the goods, but it does not ſay that he had them at the time of the writ purchaſed; whereas it ſhould ſuggeſt, that they ſtill remain in his cuſtody.

SECONDLY, They do not tell what the goods are, that, in caſe there be judgment, execution may be thereupon.

(*a*) Com. Dig. "Return" (F. 1.).
(*b*)
(*c*) 1 Roll. Abr. 893. 4. Com. Dig. "Execution" (C. 8.).
(*d*) 4. Mod. 404.
(*e*) Gilb. Ex. 22.

HOLT,

Clerk against Withers.

Holt, *Chief Juſtice.* As to the fault in the writ, in not ſuggeſting that the goods remained in his hands, it might be fatal, if it were not helped by your plea, *viz.* that you are compellable to ſell them by a *diſtringas, &c.* which admits that you have them.—The great question is, Whether the ſheriff by actual ſeizure has not veſted ſuch an actual right in the adminiſtrator, that, in caſe he had died, the other might have had an action? If he had ſold the goods, and, before payment, the adminiſtrator had died, yet by that there is ſuch a right in the adminiſtrator as adminiſtrator, and that right goes to the ſecond adminiſtrator, who repreſents the inteſtate in whoſe right the firſt adminiſtrator had it. The ſheriff out of office may ſell without a *venditioni exponas*, otherwiſe why ſhould a *diſtringas* go to the new ſheriff to command the old ſheriff to ſell? There are two ſorts of *diſtringas nuper vicecom.*; the one, according to the ſtatute of 34. *Hen.* 6. to command the old ſheriff to ſell, and bring the money into court (*a*); the other to command him to ſell, and to deliver the money to the new ſheriff. Now this *diſtringas* does not give him an authority to ſell, but is compulſive upon him to ſell; and if he do not, he forfeits iſſues *toties quoties*. When the ſheriff returns, "ſeizure *ad valentiam*," and "*remanent prò defectu emptorum*," that is only that the law gives him a convenient time to ſell; and if he continue in his office, a *venditioni exponas* ſhall go; and if he be out of his office, a *diſtringas nuper vicecom.* goes to the new ſheriff to diſtrain the old ſheriff to ſell, &c. as is ſaid before. Now then when he has returned a ſeizure to the value, and * that he is compellable to ſell under penalty of forfeiting iſſues, it is an immediate charge upon him even to the value of the goods. It is true, it is a good return for him to the firſt *fieri facias* that he has ſeized to value, and that they remain in his hands for want of buyers, for he has convenient time to ſell, but he ſhall not always keep them in his hands for want of buyers; for he cannot return upon a *diſtringas* that the goods remain in his hands for want of buyers. If they be periſhable goods, or the act of God intervene, he may plead that as a reaſon for ſelling them at an under rate, and for leſs than the value of the debt. A *ſcire facias* iſſued againſt a ſheriff upon a return of goods ſeized to the value of the debt, and he pleaded a *reſcous*, and it was held not good (*b*). And he quoted the caſe of *Mildmay v. Smith* (*c*), that debt lies againſt him upon ſuch *ſeiſin* returned, after the goods are reſcued from him. What is the *gift* of the action? Not the *reſcous*, but the ſheriff's having goods to the value. Then it is hard to ſay, that the ſheriff is not liable to the adminiſtrator; and if ſo, there is no colour for this *ſcire facias*. But to the equity of the ſtatute of 17. *Car.* 2. c. 8. where the ſtatute makes the diſtinction of a verdict, it is hard to carry it farther; but this does not appear, on the *ſcire facias*, to have been after verdict; for it was only ſaid, that the action was brought by the adminiſtrator, in which *taliter proceſſum fuit*, that

* [296]

2. Keb. 789. 821. Vide 1. Cro. 539. 2. Cro. 514. 559. 566. Mo. 468. Godb. 276.

(*a*) Raſtal, 164. Theſaur. Brevium, 90.

(*b*)

(*c*) 2. Saund. 343.

CLERK *againſt* WITHERS.

he obtained judgment. If this had appeared to have been after verdict, without all doubt the ſtatute would have reached to it, ſince an adminiſtrator *de bonis non* may thereby commence an execution upon a judgment by a prior executor, &c. *à fortiori* he may perfect an execution commenced by him: and though you ſay that the writ is bad, in not mentioning the goods in particular of which reſtitution is demanded, ſurely that is not ſo; for if goods be taken in execution, and, before ſale, judgment be reverſed, there ſhall be a *writ of reſtitution* without particularizing (*a*). And as to the ſtatute of *Weſtminſter the Second de Religioſis*, being taken by equity, there the word "default" is a default in court; not only by not appearing, but alſo in not pleading, or pleading faintly, &c. by colluſion. Suppoſe a tenant in tail ſuffer a recovery, and die, the iſſue may falſify this, that is, he ſhall not falſify the very point tried, but he ſhall ſay, that his anceſtor might have given ſuch and ſuch evidence in maintenance of his title, and omitted to do it: and if a writ of entry in the *poſt* be brought, and the iſſue is, whether *J. S.* died ſeiſed or not, and it is found againſt the tenant in tail, his iſſue after him ſhall not come and ſay, that he did not die ſeiſed; but he may come and ſay, that ſuch evidence might have been given in maintenance of the title. If the goods could be reſtored here, the *ſcire facias* would be very proper, and need not be more ſpecial than the ſheriff's return is on which it is grounded (*b*): and no doubt, if the goods had been ſold, the adminiſtrator might have an action for the money; but whether it will lie upon his having goods to the value, is conſiderable.

5. Mod. 384. Poſt. 298.

10. Mod. 412. Ld. Ray. 1051.

* [297] * POWELL, *Juſtice*. This is a new caſe; but, if this writ be proper and reaſonable, its novelty is no exception to it, for there is a time for every thing to begin. If none has a right to challenge the ſheriff in right of the original plaintiff, the defendant ought to have the goods again. If this had been *detinue*, the goods muſt have been particularly mentioned; but it may well be, that this *ſcire facias* ought not to vary from the return. If it be not after verdict, it cannot be within the equity of 17. *Car.* 2. c. 8. nor is it like the caſes upon the *ſtatute of Religioſis*; for there the fraud is the thing deſigned to be prevented: and the caſe quoted out of *Hale's Pleas of the Crown* is not by an equitable conſtruction of the ſtatute of 25. *Edw.* 3. Petit Treaſon, but is within the letter of it; for *Mrs.* is *a Maſter*: ſo it ſeems to turn much upon the judgment in the caſe of *Stiles v. Finch* (*c*), where the ſheriff returned a *reſcous*, and the action was maintained againſt him. But I cannot tell whether the having the goods in his hands, or the ſuffering them through his default to be carried from him by force, be *the giſt* of the action. He agreed that the *venditioni exponas* and *diſtringas* were not as powers or authorities to ſell, but commands to do that which he had power, and ought to do before; for the ſheriff

(*a*)

(*b*) Prac. Regiſter, 496. 5. Com. Dig. "Pleader" (3. L. 3.).

(*c*) Cro. Car. 381.

is bound to ſell; but that muſt be in convenient time. But what ſticks with me is, that if ſuch an action will lie upon ſuch a return as here, and the ſheriff ſell as ſoon as he can, and by caſualty cannot ſell to the value, whether he cannot plead this matter?

CLERK *againſt* WITHERS.

NOW PER TOTAM CURIAM the judgment was affirmed.

GOULD, *Juſtice.* It is plain, that the plaintiff, *Clerk*, is diſcharged of the debt by the ſeizure of goods to the value, and may plead that matter in his diſcharge: if the money had been levied by ſale, he might do it (*a*); and if the *money* be not levied, but *goods* to the value ſeized, he may plead that his goods *ad valentiam, &c.* were ſeized by virtue of a writ (*b*). Debt was brought upon a bond, in which two were jointly and ſeverally bound againſt one of the obligors, who pleaded a judgment had againſt his co-obligor, and a *fieri facias* thereupon, and goods ſeized to the value, but no return made, and it was adjudged (*c*), that if the former action were againſt himſelf it had been a good plea, but the doubt was, becauſe it was againſt another. That the ſheriff may ſell the goods, though out of his office, by virtue of the *fieri facias*, appears by the caſe of *Ayre v. Alden* (*d*); and then he may bring the money into court, and then it is to remain here until the adminiſtrator *de bonis non* ſhall come and take it. If a *fieri facias* be ſued out, and the plaintiff die, and then the ſheriff levy the money, and bring it into court, it ſhall there remain until adminiſtration ſued out, and then the adminiſtrator ſhall have it (*e*). So if a *fieri facias* be ſued out, and the goods are ſeized, and the plaintiff die before ſale, and then the goods are ſold, the adminiſtrator ſhall have the money; and it is no good return to ſay, that the plaintiff is dead, for that does not abate the writ (*f*). In *Clere's Caſe* (*g*) it is agreed, that if there be an *extendi facias* by an adminiſtrator, and upon the return thereof *a liberate* iſſue in his life-time, and he die * before execution of the *liberate*, yet the adminiſtrator *de bonis non* ſhall have the benefit of it (*h*), *Harriſon v. Bowden.* So here the execution is executed in the life of the adminiſtrator; and the ſale, *viz.* the formal part, may be done by virtue of the ſame writ. The ſheriff, by the levying of goods by a *fieri facias*, as he ſeizes the goods, gets a property in them againſt all perſons, and may have treſpaſs againſt the true owner if he ſhould retake them (*i*), and ſo he may have *trover*, as appears in the caſe of *Wilbraham v. Snow* (*k*), where KELYNGE, *Chief Juſtice*, held, that he gains a general property; but all the reſt ſay, it was only a ſpecial property ſo as to ſell, &c. If the ſheriff had returned, that he levied to the value of a hundred pounds, he would thereby charge himſelf with ſo much money; and debt for ſo much would lie for the

1. Cro. 328. 1. Jo. 326. Ibid. 430. 1. Cro. 539.

1. Salk. 323. 11. Mod. 34.

See Skinner, 143. 232. 650. Vide 1. Vent. 41. ſimile.

* [298]

1. Sid. 29. Yelv. 33. 1. Cro. 208. 227. 451. 457, &c. Mo. 757. Cro. 73. 3. Cro. 639. Vide 1. Vent. 52. 1. Lev 282. 1. Sid. 438. 1. Mod. 12. 30. 2. Keb. 588. 2. Saund. 47. 345. Ante, 292.

(*a*) Langdrew *v.* Wallace, 1. Lut. 588.
(*b*) Mountney *v.* Andrews, Cro. Eliz. 237. Rook *v.* Wilmot, Cro. Eliz. 209. Atkinſon *v.* Atkinſon, Cro. Eliz. 391.
(*c*) Dilks' Caſe, Trinity Term, 36. *Car.* 2. Roll 504.
(*d*) Cro. Jac. 73.
(*e*) Thorogood's Caſe, Noy, 73.—See Vincent *v.* Dale, Dyer, 76. b.
(*f*)
(*g*) Cro. Eliz. 877. Cro. Jac. 31.
(*h*) 1. Jones, 386. — See alſo Harriſon *v.* Bowden, 1. Sid. 29.
(*i*) 3. Cro. 639.
(*k*) 2. Saund. 47. 1. Sid. 438. 1. Vent. 52. 1. Lev. 282. 1. Mod. 30.

CLERK *againſt* WITHERS.

adminiſtrator *de bonis non*. This is not like the caſe put before of *an extent*; for in that caſe there muſt be *a liberate*, which is by award of the Court.

POWYS, *Juſtice, accord.* Executions are favoured in law. This execution is ſo far completed, that it is a veſting of the property in the ſheriff. The ſelling is but a formal part of the execution, and by the ſeizure and writ he has authority to ſell; and the *venditioni exponas* adds not to his authority, but is to ſpur him on to ſell. The goods by the ſeizure are *in cuſtodiâ legis*. The caſe of *Harriſon v. Bowden* (*a*) is ſtronger than this, where the very taking out of a writ of *fieri facias* is ſaid to be ſuch a veſting of the goods in the adminiſtrator, as the adminiſtrator *de bonis non* may take advantage of. And he relied on *Thorogood's Caſe* (*b*).

3. Cro. 181. 5. Mod. 384. Ante, 296. 12. Mod. 604.

POWELL, *Juſtice, accord.* The plaintiff in this *ſcire facias* ſhall not have the goods again, becauſe the execution was executed in the former adminiſtrator's life-time, and his death ſhall not abate the writ. How it would have been if it had not been executed in the party's life-time I ſhall not ſay. Execution is an entire thing; and therefore where a ſheriff levies goods, and, while they remain in his hands for ſale, a new ſheriff is choſe, he who begun the execution ſhall go on with it, and ſell the goods, and not deliver them over to the new ſheriff, who is the officer of the Court. The reaſon is, that execution is one entire thing (*c*), and therefore where it begun it ſhall end; and that is the reaſon that a *ſuperſedeas*, after execution begun, ſhall not ſuperſede it upon a writ of error, becauſe it is an execution from the firſt levying of the goods; and not like the caſe of an *extendi facias*, becauſe the *extent* is only a ſeizure into the king's hands, and there muſt be another award of the Court, *viz.* a *liberate* to deliver them over to the plaintiff; and it has been held, for that reaſon, that an adminiſtrator *de bonis non* ſhall not have the *liberate*, for there was ſomething further to be done by the Court in that which was not done in the adminiſtrator's life-time, but here nothing is to be done. The *venditioni exponas* is not of neceſſity, nor does it give to the ſheriff authority to ſell, but ſerves only to quicken the ſheriff to do his duty. It may be aſked, * what ſhall become of the money? for he is commanded to have the money in court, and yet here is none to receive it. True, the money muſt be brought into court, and remain there as money recovered by the dead perſon, and to be delivered out to ſuch as the Court ſhall be appriſed to be entitled to it.

10. Mod. 270. 307.

Vide 1. Vent. 41, 42.

* [299]

HOLT, *Chief Juſtice, accordant.* After ſeizure of goods, there is nothing more to be done by the ſheriff to the plaintiff; although if he were to ſell the goods, and deliver the money to the plaintiff, it would be well; yet the words of the writ are, "that he "levy money, and bring it into court;" and that may be done

(*a*) 1. Sid. 29.
(*b*) Noy, 73.—See alſo Dyer, 76. b.
(*c*) Year-Book 34. *Hen.* 6. pl. 36.

notwithſtanding

notwithſtanding the plaintiff's death; therefore he having nothing further to do with the plaintiff but to execute the writ, he may, notwithſtanding the death, do it.—In the next place, it is true, after he has ſeized goods to the value of the debt, though he be out of office, yet he is bound to make ſale of the goods, and to make a return; and when he has made a return of a ſeizure of the goods, and that they remain in his hands for want of buyers, that is not a diſcharge of the command of the writ, but only an excuſe that he has not the money; and he is compellable by law to bring it in, and though a *venditioni exponas* does lie, yet a *diſtringas* is the proper remedy. And there are two ſorts of *diſtringas nuper vicecom.* before mentioned (*a*); the one a *diſtringas* to the new ſheriff to diſtrain the old one to ſell the goods, and bring the money into court; the other to diſtrain him to ſell, *et denar. inde provenientes*, to deliver to the new ſheriff to bring into court. Now if a *diſtringas* lies for the new ſheriff to compel the old ſheriff to ſell, that ſhews the old ſheriff has an authority to ſell by virtue of the former writ; and that which commands the new ſheriff to diſtrain the old one to ſell, and bring in the money, is the moſt uſual (*b*). Now then ſince the ſheriff is compellable to ſell, having ſeized the goods, what ſhould hinder in this caſe that he ſhould not ſell notwithſtanding the plaintiff's death; for the writ is as forcible and compellable upon them to levy and bring in the money as if the plaintiff had lived. The ſheriff after ſeizure is bound to the value of the goods. It is not to be ſuppoſed that he cannot ſell; for he is bound to ſell at all events. If the goods be worth the money that they are appraiſed at, and that he returns them of, it is not to be ſuppoſed he can want buyers; and he is not charged to the value that they ſhall happen to be ſold for, but to that value which he has returned; for if he return goods to value, and that they are reſcued from him, he ſhall anſwer to the value returned. So here he ſhall anſwer for the value returned, and not to the value that they were ſold for. When he ſeizes the goods by virtue of the writ, the defendant is actually diſcharged, though they are not ſold; for the plaintiff muſt depend upon his execution, and rely upon that; and he has no farther remedy againſt the defendant, but altogether againſt the ſheriff; and the defendant having loſt his goods upon an execution, * which the plaintiff himſelf has choſe, the goods are in the cuſtody of the law, and the defendant diſcharged. The caſe of *Cleve v. Vere* (*c*) is not like this: The plaintiff after a writ of *extendi facias* dies, the ſheriff takes an inquiſition of the ſeizure into the king's hand, and then the adminiſtrator *de bonis non* comes into chancery, and prays a *liberate*: this came in queſtion upon an ejectment brought by an adminiſtrator *de bonis non*, and it was held, that *the extent* was void; for the writ was abated, and no matter whether the plaintiff died before the return of ſeizure, or after; becauſe no property is veſted in him by the

CLERK *againſt* WITHERS.

1. Salk. 123. 5. Mod. 377. 3. Keb. 397. Vide ante, 291, 292.

* [300]

1. Vent. 53.

Vide 2. Keb. 257. 1. Salk. 264. 322. 1. Mod. 5. 6. Carth. 149. 209. 246.

(*a*) See Year-Book 34. *Hen.* 6. pl. 36. ſaur. Brev. 90. and the book called Brevia Judicialia.

(*b*) See Raſtal's Entries, 164. The-

(*c*) Cro. Car. 450. 459. S. C. 1. Jones, 385.

CLERK *againſt* WITHERS.

ſeizure, but that only is in order to gain a property by a *liberate*; and there could be no *liberate* to him who ſued the writ, becauſe he is dead; and there is no more reaſon for an adminiſtrator *de bonis non* to have it, than if an executor had ſued a *ſcire facias* to have execution of a judgment, and before the return of the writ, had died, and the adminiſtrator *de bonis non* ſhould come for execution, which he could not have: but in this caſe there is no neceſſity for the plaintiff in the original action to come to the ſheriff for execution. But in caſe there be no act of the Court to be done, but an *elegit* ſued out, which commands the ſheriff to deliver the lands extended to the party, if there the executor or adminiſtrator die after the inquiſition, and before the delivery, in that caſe the death of the plaintiff ſhall not avoid the execution; and that appears by the caſe of *Harriſon v. Bowden* (*a*), though not ſo very plain. So the ſheriff ſeized the goods in the plaintiff's right as adminiſtrator, and by virtue thereof becomes reſponſible to him as adminiſtrator for the value which he himſelf has returned; and that right which he had, now comes to the adminiſtrator *de bonis non*; and therefore when the execution is compleatly executed, and the money brought into court, the adminiſtrator *de bonis non* may produce his adminiſtration, and the Court will thereupon let him take the money out of Court; and that is not by way of judgment. The ſheriff by the writ is to take goods, and ſell them in convenient time: indeed the not ſelling is not ſuch a fault for which he may be amerced; but if a *diſtringas* upon his return go againſt him to THE CORONERS, if he continue ſheriff, and do not ſell between the *teſte* and the return of the *diſtringas*, he ſhall forfeit iſſues: and after goods once ſeized, no writ of error or *ſuperſedeas* ſhall ſtay the ſale.

And ſo the judgment was affirmed by THE WHOLE COURT.

(*a*) 1. Sid. 29.

Caſe 387.

[* 301]

* Cragger *againſt* Glover.

If a priſoner for debt be diſcharged under an inſolvent debtor's act, and be afterwards taken again for above the ſum mentioned in the act, he muſt find ſpecial bail. Vide ante, 22. 2. Salk. 521. 1. Salk. 345. S. C. 2. Ld. Ray. 1088. S. C. 3. Salk. 56. S. C. 11. Mod. 36. 1. Ld. Ray. 383. 11. Mod. 2. 12. Mod. 513. 2. Ld. Ray. 1196. Stra. 1233.

ONE who had been in priſon the eighth of *November* before for a debt under a hundred pounds, was afterwards in purſuance of the late act of parliament, upon ſummons to the creditor at whoſe ſuit he was in, diſcharged by the juſtices of peace, and afterwards was arreſted for a ſum above eight hundred pounds.

The doubt was upon the conſtruction of the ſtatute, Whether he ſhould be held to *ſpecial bail*, or diſcharged upon *common bail*?

And upon a conference of all the other Judges, it was reſolved he ſhould be held to ſpecial bail. The doubt aroſe upon the words *any debt*. But then the PROVISO is, "that no perſon "ſhall be diſcharged out of priſon by virtue of this act who ſhall

"ſtand

" ſtand charged and indebted in above one hundred pounds to any " perſon." Now ſome would have this applied to the firſt diſcharge, that is, the diſcharge by the juſtices of peace. But why not rather to the ſecond diſcharge, or equally to both diſcharges? for he who is diſcharged upon an appearance is diſcharged, and by this act power is given to diſcharge them, if they be taken again; and then the proviſo is, " that he ſhall not be diſcharged " if the debt be above one hundred pounds." So no man is to be diſcharged by virtue of this act that is charged with a debt of above one hundred pounds at the ſuit of one perſon. And he who is now arreſted at the ſuit of one perſon is charged for a debt above one hundred pounds, therefore ſhall not be diſcharged by virtue of the act. As to the diſcharge upon *common bail* by virtue of the act, the Judges may do it as well as the juſtices of peace.

CRAGGER *againſt* GLOVER.

The Queen *againſt* Macarty.

Caſe 388.

Indictment for cheating a perſon of hats by making a falſe repreſentation.

LONDON, *to wit.* THE jurors for our lady the queen upon their oaths preſent that *Matthew Macarty*, late of the pariſh of *St. Mary Le Bow*, in the ward of *Cheap* in *London* aforeſaid, gentleman, and *Arthur Fordenborough*, late of the ſame place, gentleman, being greedy of diſhoneſt gain, and wickedly, falſly, deceitfully, and maliciouſly intending to defraud *Thomas Choune* of *London*, haberdaſher, of divers his goods and merchandizes (ſuch a day, year, and place), together deceitfully bargained with the aforeſaid *Thomas Choune* to barter, ſell, and exchange, a certain quantity of pretenſed wine, as good and true new wine of the kingdom of *Portugal* called *New Liſbon* wine, of him the ſaid *Arthur Fordenborough*, for a certain quantity of hats, of him the ſaid *Thomas Choune*, to the value of one hundred and eighteen pounds of good and lawful money of *England:* and upon the bartering, ſale, and exchange aforeſaid, he the ſaid *Arthur Fordenborough* took upon himſelf to be a merchant of *London*, and to trade and merchandize as a merchant in wines of the kingdom of *Portugal*, and then and there perſonated a merchant of *London*, as if he had been a true merchant of *London*, when in fact he the aforeſaid *Arthur Fordenborough* never was a merchant of *London*, nor did trade or merchandize as a merchant in wines of the kingdom of *Portugal*, or in any wine whatſoever as a merchant; and upon the bartering, ſale, and exchange aforeſaid, he the aforeſaid *Matthew Macarty* took upon himſelf to be a broker of *London*, and did then and there perſonate a broker of *London* as if he was a true broker of *London*, when in fact he the aforeſaid *Matthew Macarty*, at the time of the bartering, ſale, and bargaining aforeſaid, or at any time afterwards, was not a broker of *London*; and the aforeſaid *Thomas Choune*, giving credit to the ſaid fictitious aſſumptions, perſonatings, and deceits, did then and there barter, ſell, and exchange, to the aforeſaid *Arthur Fordenborough*, and did deliver to him the ſaid *Matthew Macarty*, as the broker be-

THE QUEEN *againſt* MACARTY.

tween the aforeſaid *Thomas Choune* and *Arthur Fordenborough* for the uſe of him the ſaid *Arthur Fordenborough*, a certain quantity of hats of the value of one hundred and eighteen pounds, for ——— hogſheads of the pretenſed wine aforeſaid; and that the aforeſaid *Matthew Macarty* and *Arthur Fordenborough*, upon the bartering, bargaining, and ſale aforeſaid, did affirm that the aforeſaid pretenſed wine was true new wine of the kingdom of *Portugal* called *New Liſbon* wines, and was the wine of the aforeſaid *Arthur Fordenborough*, when in fact the aforeſaid pretenſed wine was not wine of the kingdom of *Portugal*, nor was it drinkable or wholeſome, nor was it the wine of the aforeſaid *Arthur Fordenborough*, to the great deceit and damage of him the ſaid *Thomas Choune*, and in contempt of the ſaid lady the now queen, and of her laws, and againſt the peace of the ſaid lady the now queen, her crown and dignity, &c.

Caſe 389. The Queen *againſt* Macarty and Others.

If two men under the *falſe pretence* of being, the one *a broker*, the other a *wine-merchant*, exchange a liquor which they affirm to be *New Liſbon wine*, with *a batter* for *hats*, whereas in truth the liquor was, to their knowledge, only a mixture of *ſtale beer and vinegar*, it is an indictable offence.

S. C. 2. Ld. Ray. 1179. Ante, 42. 61. 105. 147.

INDICTMENT was againſt them for an impoſition put upon the proſecutor, and cheating him in a parcel of pretended *Port wine*.

Upon evidence the fact was, that one of the defendants, pretending himſelf to be *a broker*, and the other a *Portugueſe wine-merchant*, came to the proſecutor being *a batter*, and would bargain with him for a parcel of *hats*, and proffered him a parcel of *Portugueſe wine* in exchange, and upon this prevailed with him to come and taſte the ſaid wine, which in truth was but *ſtale beer* mixed with vinegar, which notwithſtanding the defendants affirmed to be *Portugueſe wine*; and hereupon a bargain was ſtruck, and hats to the value of one hundred and eighteen pounds delivered for ſo many pipes of the ſaid pretended wine.

And here the proſecutor was the only witneſs, and he was allowed for a good witneſs by HOLT, *Chief Juſtice*, becauſe it was a cheat put upon his perſon; and he compared it to *Paris's Caſe*, in 1. *Sid.* 431. where, if the recognizance had been forged, the party himſelf could not be a witneſs, but may for a cheat put upon himſelf.

* [302]

Poſt. 511. 2. Hawk. P. C. ch. 71. 4. Com. Dig. "Indictment" (D.). 1. Sid. 431. 2. Keb. 572. Hard. 331. 1. Vent. 49. 78. Stra. 8. 497. 849. 1246. 2. Burr. 1128.

* Several exceptions were taken to the indictment:

FIRST, That it was laid, "that they deceitfully bargained to "barter, ſell, and exchange, a certain quantity of *pretended wine* "as good and true *New Liſbon wine*, *&c.*" whereas this is not *wine*, but all other liquor. It ſhould have been, that they pretended this liquor to be *New Liſbon wine*, and pretending it to be ſuch wine did deceitfully bargain to barter, &c.

SECONDLY, That it is laid, "that upon the bartering, ſelling, "and exchanging aforeſaid, he the aforeſaid *Arthur Forden-"borough aſſumpſit ſuper ſe* to be a merchant of *London*, and "dealing

" dealing and merchandizing as a merchant in the wines of the " kingdom of *Portugal*, and then and there perſonated a merchant " of *London at ſi eſſet* a real merchant of *London*, whereas in " truth, &c." and the *aſſumpſit ſuper ſe* is improper, for that was, he *promiſed* and not *pretended*. The words " *at ſi*" are alſo improper, for they ſignify *but if*, which is nonſenſe: it ſhould have been *ac ſi*, " as if." THE QUEEN *againſt* MACARTY AND OTHERS.

THIRDLY, It is laid *quandam quantitatem vini*, without ſhewing what quantity, or of what price; for which *vide* 2. *Lev.* 38. that the very ſum taken in uſury ought to be ſet down, and that it is not enough to ſay that he took above the lawful uſe. Vide 1. Lutw. 465. 466.

FOURTHLY, It is not ſaid that the defendants knew it not to be real wine; it only ſays that the *vinum pretenſum* was not *vinum regni Portugaliæ*, and he cited the Year-Book of *Henry the Sixth* (*a*), and the caſe of *Rex v. Foſter* (*b*).

HOLT, *Chief Juſtice*. The crime is not the ſelling one thing for another, but here is *a falſe token*, the one pretending to be *a broker*, and the other *a merchant*, and a combination to cheat; but the exceptions ſeem weighty. Ante, 42. 61, 105. 11. Mod. 222. 1. Salk. 125. 2. Salk. 445. Ld. Ray. 865, 890. 1013.

Et adjournatur.

And being moved again in Hilary Term, IT WAS HELD, that *ſuper ſe aſſumpſit eſſe mercatorem* was well enough, and the *at ſi eſſet* only ſurpluſage.

But HOLT, *Chief Juſtice*, thought the firſt exception fatal, for *vinum pretenſum* may be *verum vinum*, and *pretenſum* is not the contrary of *verum*, but *falſum*. And where POWELL, *Juſtice*, thought *pretenſum* and *falſum* to be the ſame, and quoted the ſtatute of maintenance of *pretenſed titles* to prove his opinion, HOLT, *Chief Juſtice*, ſaid, in that very caſe, the title of the diſſeiſee, which without doubt is the true one, is called *pretenſus titulus*, which ſhews *pretenſus* and *verus* not to be contrary.

Et adjournatur (*c*).

(*a*) 9. *Hen.* 6. 53. p. 37.
(*b*) Trinity Term, 11. *Will.* 3.
(*c*) The caſe was argued again in Eaſter Term, the 4th of *Anne*, and in the Trinity Term following judgment was given for THE QUEEN, the Court ſaying that the quantity was not neceſſary to be ſhewn, and that there was enough ſet out to ſhew the defendants to be cheats. S. C. Ld. Ray. 1184.

Scrimſhaw *againſt* Weſtby. Caſe 390.

ERROR of a judgment in the common-pleas, where it was declared, that in conſideration that the plaintiff, at the inſtance of the defendant, would buy for the defendant *tanta pruna quant' in ea parte poſſet*, and bring them to *Billingſgate wharf* in *London*, he the defendant agreed to pay him eight ſhillings a buſhel for *blue* Error of judgment for plaintiff upon a promiſe to buy, &c. as many prunes as plaintiff could. S. C. Ld. Ray. 1060.

prunes,

SCRIMSHAW *againſt* WESTBY.

prunes, and ſix ſhillings a buſhel for *damſons*; that hereupon he bought ſuch and ſuch quantities of each, and brought them to the place ready to be delivered to the defendant, and tendered them, and that defendant did not receive them. Judgment was given for the plaintiff in the common pleas.

The error aſſigned was, that it was not averred that this was all he had, or could have bought.

But PER CURIAM, That need not have been ſaid, for fruit are *bona peritura*, and to be ſold immediately; and it was never the intent of the agreement that he ſhould ſtay the delivery until he could have got together * all he could have bought. Beſides, if this was not all he had bought or might have bought, as if he had bought any for others, that might have been inſiſted on at the trial, and upon *non aſſumpſit* the plaintiff muſt have proved his declaration.

* [303]

And the judgment was affirmed, eſpecially it being after verdict.

Caſe 391.

Villars *againſt* Cary.

Error upon a judgment in the palace court, &c.

Vide ante, 223. 1. Salk. 3.

ERROR OF JUDGMENT in THE PALACE COURT of *Weſtminſter*. The plaintiff declared that the now-plaintiff became indebted to him by bond in the ſum of one hundred and ſeven pounds *per nomen J. V. Vicecom' Purbeck et Domini Buckingbamiæ*.

The defendant, without craving *oyer*, pleads that he was truly indebted to the plaintiff in ninety-two pounds five ſhillings and nine-pence, and that by way of corrupt agreement for the forbearance of that ſum for a year, this bond was given, &c.

The plaintiff replies, that it was *pro vero et juſto debito*, and traverſes the corrupt agreement.

To which defendant demurred ſpecially, for the replication did not ſhew how much the juſt debt was.

Sed non allocatur. For there is enough to induce the traverſe, and if it had been alledged, you could not have traverſed the inducement; and the declaration ſufficiently ſhews the debt (*a*). And if there be a juſt debt due, and a bond is given for the payment of it with unlawful intereſt, it is uſury.

Vide 2. Salk. 451.

Then IT WAS OBJECTED, that the declaration was naught to ſay, that the defendant became bound *per nomen et cognomen J. V. Vicecom' Purbeck et Domini Buckinghamiæ*, the *Vicecom' Purbeck et Domini Buckinghamiæ* being titles, and no names, nor can they be underſtood to be his ſurname, for then they ought not to be put in Latin: and if one will become bound in ſuch manner, the way to declare is by an *alias dictus*.

(*a*) 1. Cro. 609. Jones, 627.

Quod

Quod CUR' ſaid to be the beſt way. But as to the objection in the declaration, if you would take advantage of it, you ſhould have craved *oyer* (*a*). VILLARS *againſt* CARY.

A THIRD OBJECTION was, that he declared *ad damnum* of two hundred pounds, and concludes, *unde petit judicium et damna ſua præd.* when it ſhould be *damna occaſione detentionis debiti ſui*; and we are upon ſpecial demurrer.

But PER CURIAM, It is no fault of form.

And let the debt be contracted where it will, and bond given for it within the juriſdiction of an inferior court, that gives them juriſdiction.

And the judgment was affirmed.

(*a*) Ante, 233. 2. Salk. 658. 701. Hole *v.* Finch, 2. Will. 395.

Slater *againſt* May.

Caſe 392.

LONDON, *to wit.* } BE it remembered, that heretofore, to wit, in the Term of *Eaſter* laſt paſt, before the lady the queen at *Weſtminſter*, came *John Slater*, adminiſtrator of all and ſingular the goods, rights, and credits which were *Chriſtopher Youlden's* deceaſed, at the time of his death, by *Thomas Moore* his attorney, and brought into the court of the ſaid lady the queen then there, his certain bill againſt *John May*, in the cuſtody of the marſhal, &c., of a plea of treſpaſs upon the caſe; and there are pledges of proſecuting, namely, *John Doe* and *Richard Roe*, which ſaid bill followeth in theſe words, that is to ſay, *London*, to wit, *John Slater*, adminiſtrator of all and ſingular the goods, rights, and credits which were *Chriſtopher Youlden's*, deceaſed, at the time of his death, complains of *John May*, in the cuſtody of the marſhal of the *Marſhalſea* of the lady the queen, before the queen herſelf being, for that, to wit, that whereas the aforeſaid *John May*, on the twenty-third day of *January*, in the year of Our Lord one thouſand ſix hundred and ninety-nine, at *London*, to wit, in the pariſh of *St. Mary le Bow*, in the ward of *Cheap*, was indebted to the ſaid *Chriſtopher*, in his life-time, in thirty pounds of lawful money of *England*, for ſo much money of the ſame *Chriſtopher*, in his life-time, by him the ſaid *Chriſtopher*, in his life-time, to the ſaid *John May*, at the ſpecial inſtance and requeſt of him the ſaid *John May*, before that time lent and accommodated; and being ſo thereupon indebted, he the ſaid *John May*, in conſideration thereof, afterwards, to wit, the ſame day and year aboveſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, took upon himſelf, and then and there faithfully promiſed the ſaid *Chriſtopher*, in his life-time, that he the ſaid *John May* would well and faithfully ſatisfy and pay the aforeſaid thirty pounds to the ſame *Chriſtopher*, when afterwards he ſhould be thereunto requeſted; and whereas alſo the aforeſaid *John May* afterwards, to

Declaration by an adminiſtrator during the abſence of the executor, for money lent by the inteſtate.

3. D. 351. p. 4. 6. Mod. 304. 3. Salk. 23. Salk. 42.

SLATER *againſt* MAY.

to wit, the ſame day and year aboveſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, was indebted to the ſaid *Chriſtopher* in his life-time, in other thirty pounds of like lawful money of *England*, for ſo much money of him the ſaid *Chriſtopher*, in his life-time, by the ſaid *John May*, for the ſame *Chriſtopher*, and to the uſe of him the ſaid *Chriſtopher*, before that time had and received; and being ſo indebted, the aforeſaid *John May* afterwards, to wit, the ſame day and year aboveſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, in conſideration thereof, took upon himſelf, and then and there faithfully promiſed the ſame *Chriſtopher*, in his life-time, that he the ſaid *John May* would well and truly pay and ſatisfy the ſaid thirty pounds laſt-mentioned, to the ſaid *Chriſtopher*, when he ſhould be thereunto afterwards requeſted: nevertheleſs, the ſaid *John May*, his ſeveral promiſes and undertakings aforeſaid, in form aforeſaid made, not regarding, but contriving and fraudulently intending in this behalf craftily and ſubtilly to deceive and defraud the ſaid *Chriſtopher*, in his life-time, and the ſaid *John Slater*, after the death of the ſaid *Chriſtopher*, of the ſaid ſeveral ſums of money (to which ſaid *John Slater* adminiſtration of all and ſingular the goods, rights, and credits, which were the aforeſaid *Chriſtopher Youlden's*, at the time of his death, with his will annexed, for the uſe and benefit, and during the abſence of *Elizabeth Vittery*, the executrix named in the ſaid will, by *Thomas*, by divine providence, archbiſhop of *Canterbury*, primate and metropolitan of all *England*, on the fifteenth day of *October*, in the year of Our Lord one thouſand ſeven hundred and three, at *London* aforeſaid, in the pariſh and ward aforeſaid, were in due form of law committed), hath not paid the ſaid ſeveral ſums of money, or any part thereof, to the ſaid *Chriſtopher*, in his life-time, or to the ſaid *John Slater*, after the death of him the ſaid *Chriſtopher*, nor hath hitherto, in any manner, contented them for the ſame (although to do this, the aforeſaid *John May*, by the ſaid *Chriſtopher*, in his life-time, and by the ſaid *John Slater* after the death of the ſaid *Chriſtopher*, and the committing of the adminiſtration aforeſaid, at *London* aforeſaid, in the pariſh and ward aforeſaid, was requeſted); but altogether refuſed to pay, or in any manner to ſatisfy the ſame unto the ſaid *Chriſtopher* in his life-time, and yet refuſeth to pay them to the ſaid *John Slater*, to the damage of him the ſaid *John Slater* of forty pounds: and thereupon he brings ſuit, &c. And the ſaid *John Slater* brings here into court the ſaid letters of adminiſtration aforeſaid of the ſaid archbiſhop, which teſtify the commiſſion of the adminiſtration aforeſaid to the ſaid *John Slater*, in form aforeſaid, the date whereof is the ſame day and year, in that behalf above-mentioned, &c.

Another *indebitatus aſſumpſit* for money had and received to the inteſtate's uſe.

Breach.

Letters of adminiſtration ſet forth.

Requeſt.

And now at this day, to wit, *Friday* next after the morrow of the *Holy Trinity* in this ſame Term, until which day the ſaid *John May* had leave to imparl to the aforeſaid bill, and then to anſwer, &c. before the lady the queen at *Weſtminſter*, comes as well

well the ſaid *John Slater* by his ſaid attorney, as the ſaid *John May* by *Richard Gates* his attorney: and the ſame *John May* defends the force and injury, when, &c. and ſaith that the declaration aforeſaid, and the matter therein contained, are not ſufficient in the law for the ſaid *John Slater* to have and maintain his ſaid action thereupon againſt him the ſaid *John May*; and that he hath no need, nor is bound by the law of the land, in any manner to anſwer the ſaid declaration, in manner aforeſaid declared: and this he is ready to verify: wherefore for defect of a ſufficient declaration in this behalf, the ſaid *John May* prays judgment, if the ſaid *John Slater* ought to have his ſaid action againſt him the ſaid *John May*, &c. And for cauſes of demurrer in law in this behalf, the ſame *John May*, according to the form of the ſtatute in ſuch caſe lately made and provided, ſheweth and pointeth out to the Court here theſe cauſes following, to wit, that the declaration aforeſaid is altogether uncertain, double, inſenſible, inſufficient in law, and wants form, &c. And the aforeſaid *John Slater* ſaith, that notwithſtanding any thing by the ſaid *John May* above alledged, the declaration aforeſaid of the ſaid *John Slater* ought not to be quaſhed, becauſe he ſaith that the declaration aforeſaid, and the matter in the ſame contained, are good and ſufficient in the law for him the ſaid *John Slater* to have and maintain his ſaid action thereon againſt him the ſaid *John May*: which ſaid declaration, and the matter in the ſame contained, the ſaid *John Slater* is ready to verify and prove as the Court, &c. And becauſe the aforeſaid *John May* hath not anſwered to that declaration, nor hath hitherto any ways contradicted it, the ſaid *John Slater* prays judgment and his damages by occaſion of the premiſes to him to be adjudged, &c. But becauſe the Court of our ſaid lady the queen now here, are not yet determined of giving their judgment of and concerning the premiſes aforeſaid, a day therefore is given to the aforeſaid parties before the lady the queen at *Weſtminſter*, until ——— day next after ——— of hearing their judgment of and concerning the ſaid premiſes, for that the Court of the ſaid lady the queen here thereof not yet, &c.

SLATER *againſt* MAY.

Demurrer to the declaration.

Joinder.

* Slater *againſt* May.

Caſe 393.

DEBT by an adminiſtrator *durante abſentiâ* (*a*) of *A.* who is an executor, ſhewing, that adminiſtration was committed to him *debita legis forma*, without ſhewing that at the time of adminiſtration committed he was abſent beyond ſea, or that the abſence continued.

In debt by an adminiſtrator *durante abſentiâ*, it muſt be ſhewn that the executor was *abſent beyond ſea.*—

S. C. 1. Salk. 42. S. C. 3. Salk. 23. S. C. 2. Ld. Ray. 1071. N. Lut. 102. 1. Rol. Abr. 888. Goldſb. 136. 2. Brown. 83. 1. Cro. 244. Cro. El. 602. Fitzg. 202. 257. Ld. Ray. 338. 409. 667. 685. 824. 1072. 1216.

(*a*) For executors *durante minoritate*, ſee 1. Mod. 62. 174. 2. Saund. 148. 2. Lev. 37. Cro. Car. 240. God. 104. Yelv. 130. 5. Co. 29. 5. Mod. 395. Comb. 475. NOTE *to former Edition*: ſee alſo 1. Com. Dig. "Adminiſtration" (F.)

And

SLATER *againſt* MAY.

And PER CURIAM, It is reaſonable THE ORDINARY ſhould have power to commit adminiſtration *during abſence* of an executor beyond ſea, and ſuch adminiſtrator to be accountable to the executor; and when they ſay, that it is *debita legis forma durante abſentiâ*, we muſt underſtand it an abſence beyond the ſea. *Vide* 1. *Lutw.* 342. *Clare v. Hodges.* But the ſame caſe in 4. *Mod.* 14. is not law, nor agreeable to the ROLL. But ſurely it ought to be averred that the abſence continues, according to *Pigot's Caſe* (*a*), and ſo in caſe of an adminiſtrator *pendente lite* (*b*), and ſo in all like caſes.

And judgment was given for the defendant.

(*a*) 5. Co. 29. (*b*) 3. Keb. 212.

Caſe 394. Cholmley *againſt* Veal.

On a *ſcire facias* againſt bail, and "no *capias* againſt the principal," pleaded; A REPLICATION ſhewing a *capias* ſued out after the expiration of a year and a day from the giving of the judgment, is good, although no *ſcire facias* appear.

S. C. Holt, 90. S.C. 2. Ld. Ray. 1096. Ante, 256. Hob. 195. Allen, 12. 1. Jones, 239. 2. Lev. 19. 1. Saund. 299. 10. Mod. 267. 303. 8. Mod. 31. 340. 2. Salk. 599. Ld. Ray. 156. Stra. 822. 1139. 1. Com. Dig. "Bail" (R. 4).

SCIRE FACIAS againſt the bail, who plead no *capias* againſt the principal. In replication *a capias* is ſet forth, and *non eſt inventus* returned upon it, which appeared to be *teſted* a year after the judgment.

PENGELLY. To charge the bail there ought to be *a capias* legally ſued out (*a*); and this appearing to have been ſued out after the year, and no *ſcire facias* appearing, muſt be looked upon as illegal. *Ideo, &c. Vide Lutwyche's Rep.* 1283. *Redman v. Idle, &c.* and 3. *Keb.* 671.

HOLT, *Chief Juſtice.* The plaintiff intitles himſelf to recover againſt the bail upon a breach of the recognizance, which is, that he ſhall anſwer the condemnation, or render the principal at the proper time; and the breach is aſſigned, and *a capias* ſet forth to have been taken out and returned; and what need has he to take notice of a *ſcire facias*? for the bail are ſtrangers to the record, and cannot take advantage of error in it. There not being a *ſcire facias* previous to the *capias* taken out after the year is but error at the beſt, of which bail cannot take advantage; and if it had actually appeared to us that there was no *ſcire facias*, 1 queſtion whether it would have been any thing more than error, and ſo not available to the bail; but if it were actually void, ſtill it ought to come on the bail's ſide. The plaintiff, in intitling himſelf againſt bail, never mentions any thing of the *capias*. You come and admit all that intitles him to his *ſcire facias* againſt you, *viz.* the non-payment of the condemnation, and non-rendering the * principal; but you ſay that there was no *capias*, which is to ſay that his time to render was not yet come: and what has the plaintiff to do but to ſhew that there was *a capias*. The *capias* which he

(*a*) Therefore the Court will ſet aſide proceedings againſt bail, if the *capias ad ſatisfaciendum* be *teſted* of a Term prior to that in which judgment is ſigned againſt the principal. Gawler *v.* Jolly, C. B. Mich. 29. Geo. 3. 1. H. Bl. Rep. 74.

ſhews

ſhews may be irregular; it may be ſo; but we ſhall not intend it ill until you ſhew it ſo. There is full title made for the plaintiff, and your plea is only an excuſe that there was no *capias*; and the reaſon of it is, that I am not bound to render the principal until I know what execution the plaintiff will chuſe (*a*), whether he will chuſe to have his body, which he makes appear by ſuing a *capias*; for he might have ſued an *elegit*, or *fieri facias*. 12. Mod. 601.

CHOLMLEY *againſt* VEAL.

And BY THE WHOLE COURT judgment was given for the plaintiff.

If the defendant die after *capias* and before return of it, bail is diſcharged: *per* JONES, 1. *Jo.* 136.

(*a*) Ante, 257. 1. Jones, 139. Lutw. 1273. 1. Wilſ. 334. 2. Wilſ. 65. Dougl. 58.

Thornborough *againſt* Whitacre. Caſe 395.

ASSUMPSIT, That in conſideration of half a crown by the plaintiff in hand paid to the defendant, he promiſed to pay two grains of rye upon *Monday* the twenty-ninth of *March* in ſuch a year, four grains the next *Monday* after, and ſo on by progreſſional arithmetick every *Monday* for a year; and *non aſſumpſit* pleaded.

Aſſumpſit lies on a promiſe to deliver a grain of rye on *Monday*, and an additional two grains, in arithmetical progreſſion, on every *Monday* during the year; but the jury may give ſuch damages only as they think reaſonable.

PER CURIAM, upon motion: Let them go to trial; and though this would amount to a vaſt quantity, yet the jury will conſider of the folly of the defendant, and give but reaſonable damages againſt him (*a*).

(*a*) This came before the Court on a demurrer to the declaration; and the Court was of opinion that the action would lie; but the defendant, perceiving the opinion of the Court to be againſt him, offered the plaintiff his *half-crown* and *coſts*, which was accepted of, and ſo no judgment was given in the caſe. S.C. 2. Ld. Ray. 1166.—In *aſſumpſit* to pay for *a horſe* a barley-corn a nail, doubling every nail, it was averred in the declaration that there were thirty-two nails in every ſhoe, which, doubling every nail, came to 500 quarters of barley; and HYDE, *Chief Juſtice*, directed the jury to give the value of the horſe in damages, and they gave eight pounds; and held good, James *v.* Morgan, 1. Lev. 111. for a catching bargain ſhall not be taken advantage of, Lord Cheſterfield *v.* Janſen, 1. Wilſ. 295. and giving him the value of the horſe was giving him all that he was in reaſon and juſtice intitled to; and to that he was intitled, as the defendant had no right to have the horſe for nothing. 2. Bac. Ab. 4. *notis.*

S.C. 2. Ld. Ray. 1164. S.C. 3. Salk. 97. 1. Jo. 138. 1. Vent. 267. 1. Keb. 569. 1. Lev. 111. Matheſin Walſiſii, ff. 1. cap. 31. 1. Wilſ. 295. 2. Bac. Ab. 4.

Phips *againſt* Jackſon. Caſe 396.

IT was pleaded in *abatement*, That *tempore quo memoria non extat* all *the clerks* of the queen's COURT OF EXCHEQUER were privileged from being ſued elſewhere than in that court; and that the defendant was clerk to *R. P.* one of the barons of our exchequer aforeſaid.

There are two ways of pleading *privilege*: 1ſt, with a *profert* of the writ; and 2dly, as a matter of fact. 2. Salk. 543. Ante, 26. 106. 114. 1. Jones, 289. 1. Vent. 264. 1. Ld. Ray. 336. 7. Mod. 106. Tidd's Pract. 51.

And

PRIPS *againſt* JACKSON.

And upon demurrer,

PER CURIAM: There are two ways of pleading of *a privilege*.

One is to go to iſſue, and at the trial, if the party be an officer of record, to ſhew it by producing the record; if he be not an officer of record, but is attendant to one of the barons, that muſt of neceſſity be tried by a jury, becauſe the court of exchequer, as a court, cannot take notice of it no more than we.

The other way is, if he be an officer on record, to produce a writ of privilege at the time of the plea pleaded, and then no iſſue can be joined upon it.

Immemorial cuſtom how pleaded. Co. Lit. 115.

And here the cuſtom is ill pleaded, for *tempore quo non exist memoria* is nonſenſe, and ſhould be *cujus contrarii memoria non, &c.*

But he having ſhewed that he is one of the clerks of A BARON, and inſiſting upon privilege, ought not we to take notice that he ought to have privilege?

*[306]

Plea here ill for want of averment, &c. Ante, 105. Vide 3. Mod. 216. 2. Lev. 50. 88. Vide ante, 3. 223. Ld. Ray. 13. 337. 532. 635. 673. 704. 869. 898. 1173. 1208. 1524. 1556.

* To which it was anſwered, that he did not aver that he was clerk to one of the barons of the queen's chequer, but *de ſcaccario noſtro*; and for that a *reſpond' ouſter* was awarded.

Caſe 397. Michell *againſt* Waldron.

A miſpriſion of the clerk in a *writ of inquiry* in common pleas, may be amended in the king's bench, and the Court will order THE ROLL to be brought in. Ante, 270. 272. Cro. Jac. 372. 1. Roll. Rep. 408. 3. Mod. 112. 8. Mod. 304. 1. Com. Dig. "Amendment" (S.). Comy. 580.

WRIT OF ERROR of a judgment in the court of common pleas. The error aſſigned was, that the award of the *writ of inquiry* was, "*Ideo præceptum eſt vic' London. quòd inquirat*," in the *ſingular number*, and ſo all along in the *ſingular number*.

The queſtion was, Whether this be amendable in this court, ſo as to ſave the defendant the coſts which he muſt pay upon an amendment in the common pleas? And the caſes of *Lewſon v. Redleſton* (*a*) and *Wolley v. Moſeley* (*b*) were quoted for ſuch amendments here; the caſe in *Ventris* (*c*) was allowed by the Court.

But THE COURT ſeemed to incline that they could not amend, this being the award of the Court; but would conſider.

And in *Hilary Term* THE COURT ſaid, it was only a miſtake of the clerk; for the courts of *Weſtminſter* do take notice that there are two ſheriffs in *London*.

(*a*) Cro. Eliz. 677. 709.
(*b*) Cro. Eliz. 760.
(*c*) 2. Vent. 171. See alſo Walker v. Riches, Cro. Eliz. 162. and Rea v. Gwynn, Hob. 90.

But

But becauſe the Court cannot amend without having ſomething amend by, HOLT, *Chief Juſtice*, ordered the officer of the court common pleas to attend with THE ROLL in order to make the amendment. MITCHELL *againſt* WALDRON.

Woodcock *againſt* Morgan. Caſe 398.

DEBT upon a bond, ſhewing that on ſuch a day the defendant became indebted to the plaintiff *per ſcriptum ſuum obligatorium*, without ſhewing the date of the bond, or ſaying that it was ſealed and delivered.

In debt on bond "*per ſcriptum* "*obligatorium*" is ſufficient, without mentioning date, ſeal, or delivery. Cro. Car. 209.

PER CURIAM. Becoming indebted *per ſcriptum obligatorium* enough.

Lev. 234. Cro. Eliz. 737. Cro. Jac. 420. Lutw. 1667. 1. Salk. 473. 4. Co. 65. Ld. Ray. 76. 703. 1043.

But the plaint being, "*Woodcock* complains of *Morgan*, *&c.* of a plea that he render to him ſixty pounds of lawful money, &c." without ſaying "which he owes to him and unjuſtly detains, &c." was held ill.

Debt on bond, omitting "*quæ* "*ei debet, &c.*" is bad. 1. Lev. 130. 224. 1. Sid. 342.

The Queen *againſt* Buck and Hale. Caſe 399.

THE defendants were found guilty upon an indictment for a miſdemeanour, for that being collectors and aſſeſſors of the public taxes in ſuch a pariſh, they aſſeſſed and rated ſome at too high a rate, and omitted to tax ſome others in their books, and yet levied the taxes upon them, and put the money in their own pockets. And now coming to receive judgment,

Aſſeſſing and levying taxes unfairly for ſiniſter purpoſes is an indictable offence, and puniſhable by pillory.

MONTAGUE urged, that it being no offence of an infamous nature, as *perjury* or *forgery*, nor againſt the publick, there ought not to be any corporal puniſhment, as pillory. 1. Salk. 380. 11. Mod. 53. 79. 137.

* PER CURIAM. It is an offence of dangerous conſequence, and very pernicious to the Government, of very ill example, and too much practiſed of late; for what greater diſcouragement can there be to the people to pay their taxes freely, than to have injuſtice and inequality of rates for the private advantage of ſome? and therefore this offence deſerves an exemplary puniſhment. Vid. ante, 234. 1. Cro. 332. Cro. Jac. 65. Noy. 102. Mo. 781. 3. Inſt. 145. 1. Leon. 295.

And THEY WERE ADJUDGED to *the pillory* in the county where the fact was committed; and THE MARSHAL was ordered to carry them down, and a writ was iſſued to the ſheriff of the county to aſſiſt him in the execution.

Case 400. The Queen *against* The Inhabitants of the County of Wilts.

The sessions cannot make *an order* for the repair of a highway; for they have no jurisdiction but on *presentment*.

UPON debate on a motion for *a new trial*, where the issue was, Whether THE COUNTY of *Wilts* at large, or THE TOWN of *L.* within the county, was obliged to repair the bridge of *L.* in that county? an order of sessions, formerly made upon the inhabitants of *L.* to repair, was offered in evidence for *the county* at the former trial; and rejected upon this reason, that the justices of peace have no jurisdiction over highways but upon A PRESENTMENT, and none had been to warrant this order.

S.C. ante, 191. S.C. 1. Salk. 359. S. C. 3. Salk. 381. S. C. Holt, 339. 12. Mod. 13. 198. Ld. Ray. 725. 792. 804. 856. 1175. 1249. 1169. 1. Bac. Abr. 329.

It was declared BY THE COURT,

The admission of bad, or the rejection of good evidence, is a ground for a *new trial*.

FIRST, That it is a good cause to grant *a new trial*, that the Judge who tried the cause over-ruled good, or admitted that which was no evidence, and that although the other party has a remedy by *bill of exception*.

Comy. 601. 1. Peere Wms. 212. Stra. 642. 1105. 1142. Ld. Ray. 62. 148. 1353. Ante, 18. 22. 242. 5. Com. Dig. "Pleader" (R. 17.).

Inhabitants cannot change the situation of a bridge, &c.

SECONDLY, That the inhabitants of the whole county cannot of their own authority change the bridge or highway from one place to another; for it cannot be without act of parliament (*a*).

The county of common right bound to repair bridges.

THIRDLY, The county of common right are bound to repair public bridges; but a particular person, town, &c. may, for a special cause, be bound to repair them, as by tenure, prescription, &c. (*b*).

2. Salk. 12. Vaugh. 341. Cro. Car. 266, 267.

A private bridge dedicated to the publick shall be repaired by the county.

FOURTHLY, If a private person build a private bridge, which afterwards becomes of public convenience, the whole county is bound to repair it (*c*).

Indictment of a county shall be tried in the next adjacent county.

FIFTHLY, This matter concerning the whole county, suggestion may be of any other county's being next adjacent, and *the venue* shall come from thence for the necessity of an indifferent trial (*d*).

(*a*) 2. Inst. 701. But see the statutes 1. *Ann.* st. 1. c. 18. the 12. *Geo.* 2. c. 29. s. 13. and the case of the King *v.* Justices of Glamorganshire, 5. Term Rep. 282. 1. Hawk. P. C. c. 77. 1. Bac. Abr. 330.

(*b*) 2. Lev. 112. Poph. 152. 2. Hawk. P. C. c. 77. s. 4.

(*c*) See this point adjudged in the case of the Inhabitants of the West Riding of Yorkshire, 2. Bl. Rep. 685. and S. C. 5. Burr. 2594.

(*d*) See 2. Burr. Rep. 859.

SIXTHLY,

SIXTHLY, One of the county is a good *witneſs* in the caſe, though not a good *juror* (*a*).

Inhabitant is a good *witneſs*, but a bad *juror*.

And at laſt a rule by conſent was made.

And by HOLT, *Chief Juſtice*, If it be not obeyed, *an attachment* may go againſt the inhabitants of the whole county, and catch as many as one can of them.

A county may be *attached* for diſobeying a *rule of court*.

(*a*) By 1. *Ann.* ſt. 1. c. 18. ſ. 13. In all informations or indictments the evidence of the inhabitants of the town, "corporation, county, riding, or diviſion, in which the decayed bridge or highway lies, ſhall be admitted."

* [308]

* Treil *againſt* Edwards.

Caſe 401.

PER CURIAM. If an executor ſuffer judgment to go againſt him by default upon executing a *writ of inquiry*, he ſhall not give evidence of want of *aſſets*, for he is eſtopped, as if it had been the caſe of *an heir*; for he ſhould have pleaded *plene adminiſtravit* (*a*), or ſpecially what *aſſets* he has (*b*).

If an executor ſuffer judgment to go by *default*, it is an admiſſion of *aſſets*.

Cro. Eliz. 102. 2. Stra. 1075. 5. Com. Dig. Pleader" (Z. 3.)(2. D. 9.).

1. Jones, 87.

(*a*) 3. Term Rep. 685. [(*b*) See Skelton v. Hawling, 1. Will. 258. *accord.*

Anonymous.

Caſe 402.

A CITATION was in the conſiſtory court of ——; and a prohibition was moved for upon three ſeveral points:

A prohibition cannot be granted for the double count of *denying copy of the libel* and on *the merits*; but it may be granted on the firſt count, *quouſque*; and when that is diſcharged by receiving the copy, a prohibition may be granted on the *merits*.

FIRST, That they refuſed a copy of the libel.

SECONDLY, That the citation was, *profanatione cœmeterii* of ſuch a church; and that the ſuppoſed profanation was by the party as coroner, in the duty of his office, in digging a corpſe for a view.

THIRDLY, That the ſaid church was within ſuch *a peculiar*, and conſequently not within the juriſdiction of the conſiſtory court, not even by letters of requeſt; and for authority for prohibitions upon the third point were quoted *Latch*, 180. *Noy*, 89.

HOLT, *Chief Juſtice*. Your ſuggeſtion contains two matters that ought not to go together: the one, the denial of the copy of the libel; and the other upon the merits; for they are grounds for prohibitions of different natures: the firſt, for a prohibition only *quouſque*, which is *ipſo facto* diſcharged by granting a copy of the libel (*a*) without writ of conſultation; the other, *a peremptory prohibition*, which ties them up till *a conſultation*, and upon ſuch a ſuggeſtion we ought not to grant a prohibition. Indeed, if a prohibition until they give copy of the libel, be granted before

S. C. Holt, 529. 1. Salk. 190. 377. 7. Mod. 10. Ld Ray. 442. 992. 6. Com. Dig. "Prohibition" (F. 15.)

(*a*) Year-Book 4. *Edw.* 4. pl. 37. b. Salk. 553. Hardres, 364. Ante, 87. 1. Vent. 5.

ANONYMOUS. any libel exhibited, it does not bind them from exhibiting a libel; but afterwards they ſhall not proceed until they give a copy of it; and then, to have a prohibition upon the merits, you muſt make a new ſuggeſtion.

And as to THE THIRD POINT, all *peculiars* are not inferior to THE ORDINARY of the dioceſe in which they are; and ſuch as are not, cannot tranſmit any cauſe to the ordinary, and ſuch tranſmitting muſt always be to the immediate ſuperior. The *dean and chapter of Saliſbury* have a large peculiar within the limits of the dioceſe, but as much out of the juriſdiction of the dioceſe of *Saliſbury* as the dioceſe of *London* is. The peculiar juriſdiction of an archdeacon is not properly a peculiar, but rather a ſubordinate juriſdiction (*a*). The remiſſion of the cauſe muſt be to that juriſdiction to which the appeal would lie in caſe the cauſe had not been remitted. A peculiar *primâ facie* is to be underſtood of him who has co-ordinate juriſdiction with the biſhop; and therefore it would be improper to determine what ſort of peculiar this is, upon motion. If your ſuggeſtion were right, it were fit for a prohibition, that the matter might come in debate on a declaration therein.

Vide 1. Cro. 340. 3. Cro. 102. 1. Salk. 40, 41. 3. Lev. 293.

(*a*) Hob. 185, 186.

* [309]

Caſe 403. * The Queen *againſt* the Mayor of Hereford.

An argumentative return upon a *mandamus* is ill. S.C 2. Salk. 701. Ante, 89. 2. Salk. 430. 432. 434. 436. 10. Mod. 101. 174. 12. Mod. 2. 113. 401. Ld. Ray. 1244. 1267. 1304. 1379. 1405. 5. Com. Dig. "Mandamus" (D. 5.).

MANDAMUS to him to ſwear ſuch a one into the place of *town-clerk* of *Hereford*, and the return was, that upon election *B.* had eighteen voices, and the party who ſued the *mandamus* but ſeventeen, and that they ſwore in *B.*

PER CURIAM. It is a bad return, becauſe it is argumentative, when it ſhould be expreſs and direct that he was not choſen (*a*): and the caſe in *Sir Thomas Jones* (*b*) was ſaid by HOLT, *Chief Juſtice*, to be a ſtrange caſe, and contrary to ſubſequent reſolutions; but if the mayor had returned an election *de facto*, and that the party had given a bribe to get himſelf choſen, it had been ſomething.

(*a*) See Rex *v.* Mayor of Doncaſter, 2. Burr. Rep. 738. Rex *v.* Lyme Regis, Dougl. 181. and Rex *v.* Mayor of York, 5. Term Rep. 66. See 2. Keb. 662. 716. 1. Sid. 209.

(*b*) 2. Jones, 177, 178.

Caſe 404. Bernardiſton *againſt* the Sheriff of Middleſex.

A miſnomer in a bail-bond and *reddidit ſe*, variant from the firſt writ, cannot be amended.

THE plaintiff took out a writ againſt *J. S.* and delivered it to the defendant to be executed: upon the arreſt, the bail-bond by the officer was to appear at the ſuit of *Bernadiſtant*, and bail was put in by that name, and afterwards a *reddidit ſe* by the ſame name; and the plaintiff ſued the ſheriff for eſcape.

Moor, 407. Barnes, 116. 1. Bac. Abr. 216.

MONTAGUE

MONTAGUE moved, that the *bail-piece* and the *reddidit ſe* might be made according to the writ. BERNARDISTON *againſt* THE SHERIFF OF MIDDLESEX.

PER CURIAM, It cannot be; for *the bail* muſt be according to the *bail-bond*, and not according to *the writ* or the return of it: and though it be *vitium ſcriptoris* in the bond, yet we cannot help it.

Anonymous. Caſe 405.

PER CURIAM. It is a great abuſe, in ejectment, that people make *nominal leſſees* perſons not *in rerum naturâ*, or at beſt not known to the defendant; ſo that he thereby may loſe his coſts. In ejectment, the attorney is liable to coſts where the plaintiff is nominal.

And PER OMNES, The attorney that does ſo ought to pay coſts. Ante. 130. 222. Carth. 3. 204. 277. 288. 391. 2. Lev. 66. Run. Eject. 143. Stra. 402.

And in this caſe an attorney was put to anſwer interrogatories for ſuch a practice. 12. Mod. 318. 445. 656.

Dean *againſt* Crane. Caſe 406.

A NOTE had been made by the defendant to the plaintiff's teſtator, above ſix years before the action brought, for payment of money. An *old debt* is revived by a *new promiſe* made after the expiration of *ſix years*; but *owning* the debt is not ſufficient.

Upon *non aſſumpſit infra ſex annos*, at the trial before HOLT, *Chief Juſtice*, the plaintiff gave evidence of a promiſe made to himſelf after the arreſt and before the bill exhibited.

The queſtion was, Whether this evidence maintained the declaration? S.C. 1. Salk. 28. Ante, 25. 240. 2. Vent. 151. 10. Mod. 314. 12. Mod. 223. 444.

And the caſe of *Heylin v. Haſtings* was remembered, wherein, upon conference with ALL THE JUDGES OF ENGLAND, it was held, that a * promiſe after the ſix years brings the matter out of the ſtatute of Limitations; that *owning* the debt does not go ſo far; but that is evidence of a promiſe (*a*).

2 Peer. Wms. 373. 3. Peer. Wms. 84. 143. Comy. 54. 2. Burr. 738. Bull. N. P. 149.

(*a*) But it ſeems to be now ſettled, that an *acknowledgment* of the debt, even after the commencement of the action, will take it out of the ſtatute of Limitations, Yea *v.* Fouraker, 2. Burr. 1099. and the ſlighteſt acknowledgement has been held ſufficient; as ſaying, "Prove "your debt, and I will pay you," Heylin *v.* Huſkins, Salk. 29.; or, "I am ready "to account, but nothing is due to you," Cowp. 548. and even a much ſlighter acknowledgement than theſe is ſaid to be ſufficient, Cowp. 548. What is an *acknowledgment*, is matter for the conſideration of a jury, Lloyd *v.* Maund, 2. Term Rep. 760 But although a *promiſe* is not neceſſary to take the demand out of the ſtatute, yet the declaration muſt amount to the acknowledgement of *a debt*; and therefore where a perſon ſued by an executor ſaid, "I acknowledge the "*receipt of the money*, but the teſtator *gave it* me," CRYER, *Baron*, held it not ſufficient, Owen *v.* Wolley, Bull. N. P. 148.

Promiſe to a *teſtator* is not proved by a promiſe to his *executor*.

NOTE, Here the declaration was on a promiſe made to the teſtator, and the promiſe given in evidence was to the executor.

THE COURT ſaid, that here the executor might declare of a promiſe to himſelf.

But *adjournatur*.

And in *Hilary Term*, upon conference with ALL THE JUDGES, it was held, the evidence did not maintain the declaration.

Caſe 407.

Anonymous.

Filling up a writ after it is ſealed, is *a contempt*.

PER HOLT, *Chief Juſtice*. It is illegal to fill up a writ after it is ſealed; and whoever is arreſted by virtue of ſuch a writ has an advantage.

Dyer, 241. 244. Savil, 31. Ante, 16. 2. Hawk. P. C. ch. 22. ſ. 43.

But *quære* PER MR, if it be falſe impriſonment, or to be relieved on motion.

Cowp. 9. 3. Bl. Rep. 823. 2. H. Bl. Rep. 29.

Caſe 408.

Peat's Caſe.

A *mandamus* lies to admit a teaching diſſenter to qualify himſelf.

KING moved for *a mandamus* to the juſtices of the ſeſſions of the county of *Warwick*, to admit *Peat* to take the oath of allegiance, and to ſubſcribe according to the act of Toleration, in order to be qualified to teach a diſſenting congregation.

And it was granted (*a*).

S. C. ante, 228. S. C. 2. Salk. 572. Stra. 58. 4. Burr. 1991. 1. Bl. Rep. 300.

On a *mandamus* to be admitted, a title muſt be ſhewn.

HOLT, *Chief Juſtice*. The party ought to ſuggeſt whatever is neceſſary to entitle him to be admitted; and if that be not done, or if it be done and the fact be falſe, that will be good matter to return.

5. Mod. 420. 3. Term Rep. 275. B. R. H. 362. 5. Com. Dig. "Mandamus" (C. 3.).

(*a*) See Rex v. Juſtices of Derbyſhire, 1. Bl. Rep. 606. 2. Burr. 1043. 1. Hawk. P. C. 7th edit. ch. 16. ſ. 31.

Caſe 409.

Williams *againſt* Hoſkins.

If there be judgment in ejectment for *two meſſuages*, a *ſcire facias* to revive it, reciting by miſtake a judgment for *one meſſuage* only, cannot be amended; but the plaintiff may take out a *new writ*.

JUDGMENT was given in ejectment for *two meſſuages*, and after a year a *ſcire facias* upon it recited a judgment of *one meſſuage* only; and to this *nul tiel record* was pleaded.

It was moved to amend it.

S. C. ante, 283. S. C. 1. Salk. 52. S. C. 3. Salk. 32. S. C. Holt, 58. 762. S. C. 3. Ld. Ray. 1057. Ante, 284. 286. Carth. 70. 76. 367. 520. 11. Mod. 263.

But

WILLIAMS *againſt* HOSKINS.

But PER CURIAM, It cannot be; for this is a good writ for any thing that appears on the face of it; and for that, if there were a judgment for one meſſuage, this writ would be a good writ to revive; ſo being good in itſelf, though not oppoſite to this purpoſe, to amend would be to make a new writ, or to alter a good writ and fit it to another purpoſe. To amend this writ would falſify the defendant's plea, which was good at the time when it was pleaded; and that this ought not to be, the caſe of *Napiere v. Sir John Germaine* (*a*) was quoted, where, after *miſnomer* pleaded, the Court refuſed to amend, becauſe it would falſify the plea: but if the fault had appeared in the very writ, it might be amended (*b*).

And *tandem* the plaintiff for his expedition took another writ.

And PER CURIAM, That he might do without getting this quaſhed; for if this writ abate, then it is not the ſame cauſe.

(*a*) Hob. 117.

(*b*) So now by 5. *Geo.* 1. c. 13. "A "variance from the original record, or "other defect in a writ of error, ſhall be "amended and made agreeable to the "record by the Court where the writ is "returnable." See Fitzg. 201. 268. Stra. 807. 863. 2. Ld. Ray. 1531. Cowp. 425. 1. Com. Digeſt, "Amendment" (2. C. 4.)

* Linch *againſt* Hooke.

Caſe 410.

SHE was arreſted by the name of *Minors*, and gave a bail-bond by that name, and now would plead *miſnomer*.

A *wife*, after bail-bond given, may plead *miſnomer*, &c. S. C. ante, 225. S. C. 1. Salk. 7. Ante, 154. Vent. 13. Cro. Eliz 198. 249. 583. 2. Bl. Rep. 1082.

PER CURIAM. If one be arreſted by a wrong name, and brought into court, he may plead *miſnomer*: and if a *feme covert* be arreſted by a wrong name, and give a bail-bond, yet ſhe may plead the *miſnomer*; for her bond being that of a *feme covert*, ſhe may plead *non eſt factum* to it; therefore it will not eſtop her.

The Queen *againſt* Hannon.

Caſe 411.

HANNON was indicted, for that being a *communis deceptor* of the queen's people, he came to the wife of *B.* and made her believe that he had ſold part of a ſhip to her huſband, and upon that account got ſeveral ſums of money from her.

An indictment that *A.* being a *common cheat*, &c. is too general. Ante, 42. 61. 182. 301. 1. Salk. 379. 1. Sid. 282. 1. Lev. 299. 1. Mod. 71. 288. Stra. 849. 1246. 3. Burr. 2474.

BY THE COURT,

FIRST, "*communis deceptor*" is too general, and ſo is "*communis oppreſſor*," "*communis perturbator*, &c." and ſo of all other (except *barretor* (*a*) and *ſcold* (*b*), without adding of particular inſtances.

(*a*) Cro. Jac. 527. 1. Sid. 282. (*b*) See 1. Hawk. P. C. ch. 75. ſ. 5. Strange, 181.

A fraud of a private nature, effected by a naked lie, is not indictable. Barr. 1125. 1. Bl. Rep. 273.

SECONDLY, The particular inſtance alledged here is of a private nature: if he had made uſe of any *falſe token*, it would have been otherwiſe.

And THE COURT ordered the indictment to be quaſhed. 1. Hawk. P. C. ch. 71.

Caſe 412.

Tenant *againſt* Goldwin.

Special action on the caſe for not repairing a partition wall, whereby the plaintiff was injured.

MIDDLESEX, *to wit*, } BE it remembered, that heretofore, to wit, in the Term of *Eaſter* laſt paſt, before the lady the queen at *Weſtminſter*, came *Robert Tenant* by *John Rice* his attorney, and brought into the court of the ſaid lady the queen then there, his certain bill againſt *Luke Goldwin*, in the cuſtody of the marſhal, &c. of a plea of treſpaſs upon the caſe; and there are pledges of proſecuting, to wit, *John Doe* and *Richard Roe*, which ſaid bill follows in theſe words, to wit, *Robert Tenant* complains of *Luke Goldwin*, being in the cuſtody of the marſhal of the *Marſhalſea* of our lady the queen, before the queen herſelf, for that, to wit, that whereas he the ſaid *Robert*, on the firſt day of *October*, in the firſt year of the reign of the lady *Ann*, now queen of *England*, &c. and from thenceforth always until this time was poſſeſſed, and as yet is poſſeſſed of one meſſuage ſituate lying and being in *Frith-ſtreet*, in the pariſh of *Saint Ann*, within the liberty of *Weſtminſter*, in the county of *Middleſex*, for a certain term of years not yet ended, and uſed to place and keep in his cellar parcel of his meſſuage aforeſaid, ſtores of coals and ale for the uſe of his family, and alſo to be ſold and merchandized to divers perſons who uſed to buy of him the commodities aforeſaid, in his meſſuage aforeſaid, to the great profit and advantage of him the ſaid *Robert*, which ſaid cellar lies contiguouſly, and for all the time aforeſaid did lie contiguouſly, to a meſſuage of the aforeſaid *Luke*, in the pariſh aforeſaid, and uſed to be ſeparated and fenced from a privy-houſe of office, parcel of the ſaid meſſuage of the aforeſaid *Luke*, by a thick and cloſe wall which belongs to the ſaid meſſuage of the aforeſaid *Luke*, and of right ought to have been repaired by the aforeſaid *Luke*, for all the time aforeſaid: nevertheleſs, the aforeſaid *Luke* well knowing the premiſes, but contriving and fraudulently intending unjuſtly to aggrieve him the ſaid *Robert* in this behalf, and wholly to deprive him the ſaid *Robert* of the uſe and advantage of the cellar of his meſſuage aforeſaid, and to hinder him of the profit of his commerce aforeſaid, on the ſame firſt day of *October*, in the aboveſaid year of the reign of the ſaid lady the queen, and from thenceforth always until this time ſo negligently kept and repaired the wall aforeſaid (although often requeſted to repair the ſame, to wit, by him the ſaid *Robert*, on the ſame firſt day of *October*, in the pariſh aforeſaid), that for want of due care and reparation of the ſame wall, the filthineſſes and naſty things of the ſaid privy-houſe of office flowed out of the ſaid privy-houſe of office, by the decayed parts and breaches of the wall aforeſaid, into

Averment of the uſage for defendant to repair.

Breach.

into the cellar aforeſaid of him the ſaid *Robert*, and overflowed the ſame cellar, to wit, in the pariſh aforeſaid, for the whole time aforeſaid, by which he the ſaid *Robert* loſt the uſe of his cellar and the profit of his commerce aforeſaid, for all the time aforeſaid; whereupon the ſaid *Robert* ſaith, that he is injured, and hath ſuſtained damage to the value of one hundred pounds, and thereupon he brings ſuit, &c.

TENANT *againſt* GOLDWIN.

Plaintiff damnified.

Tenant *againſt* Goldwin. Caſe 413.

In an action on the caſe brought by a leſſee for years againſt the owner of the adjoining houſe, for not repairing a party wall, by which the plaintiff's houſe was damaged, it is not neceſſary to ſtate that he was bound by *preſcription* to repair the wall; it is ſufficient to declare, that he was *poſſeſſed* of a meſſuage for a certain number of years, and that the defendant ought to repair the wall, &c.

ACTION on the caſe: The plaintiff declared, that on ſuch a day and year he was *poſſeſſed*, and yet is poſſeſſed of a meſſuage, ſituate in ſuch a place, for a certain number of years yet not ended, and alſo of a cellar parcel thereof; which ſaid cellar lies, and all the aforeſaid meſſuage did lie, contiguous to the meſſuage of the defendant, in the pariſh aforeſaid; and from a vault, parcel of the defendant's meſſuage, was wont to be ſeparated by a ſtrong thick wall, which to the meſſuage of the defendant did belong, and by the defendant, for all the time aforeſaid, ought to be repaired; but that the defendant, *machinans, &c.* though often requeſted to repair the ſaid wall, ſo negligently kept it in repair, that for default of care in him, and repairing of the ſame, the filth of the ſaid vault, by the decay and breach of the ſaid wall, in the ſaid cellar did flow, and fill the ſame for ſuch a time, by which the plaintiff loſt the uſe of his cellar, &c.

The whole queſtion was, Whether the declaration was good to entitle the plaintiff to this action?

Becauſe, as was objected, it was to put a charge upon the defendant, which could not be but by *preſcription*, and none was laid here; nor was it ſaid the meſſuage was * an *ancient meſſuage* capable of a preſcription.

*[312]

But in maintenance of the declaration, and that it was well, being for *a tort* to his poſſeſſion, was quoted the caſe of *Sands v. Treſuſis* (*a*), and the caſe of *Winford v. Woollaſton* (*b*), the laſt of which was for ſtopping a way which the plaintiff *habere,—frui et uti debuit* over the defendant's meadow, without making any title to the way, but merely upon the poſſeſſion; and it was held that it would be good upon demurrer; and *per quoſdam*, upon a ſpecial demurrer; and is ſo much the ſtronger for that it was a charge againſt common right. There is difference between charging *a wrong-doer*, and the *tenant of the land* in which one would lay the charge. Beſides, the law has reſpect to the nature of the charge, as whether it ariſe by the act of the party, or by act in law: as in *aſſize* for a rent charge againſt the tenant of the land, the plaintiff muſt ſhew his *title*; otherwiſe it is in caſe of *aſſize* for rent ſervice;

S. C. 1. Salk. 221. 360. S. C. Holt, 500. S. C. 2. Ld. Ray. 1089. S. C. Kay. Ent. 324. Ante, 244. 2. Vent. 292. Cro Jac. 43. 125. 4 Mod. 423. 1, 5. 3. Lev. 266. 49. 5. Com. Dig. "Pleader" (C. 39.)

1. Burr. 440. 3. Term Rep. 264. Vide Show. 64. 3. Lev. 133. 3. Mod. 51, 52. 132. 294. Pal. 290. Cro. Car. 495. Ld. Ray. 266. 12. Mod. 279. 220. Comy. 7.

(*a*) Cro. Car. 575. (*b*) 3. Lev. 266.

and

TENANT *againſt* GOLDWIN,

and the reaſon of the difference is, becauſe one is of common right, and the other not (*a*). So in an *aſſize* of common in groſs, there muſt be *a title* made to the plaintiff; *ſecus* it is of a common appendant, becauſe it is by act in law; and though it may be by preſcription, yet that is but ſubſequent evidence, and not the cauſe and foundation of it. If *the hundred* be indicted for not keeping the highway in repair, it need not be ſaid how it is chargeable; but if it were againſt *a particular perſon*, it is otherwiſe: ſo here, if this action were for not repairing another man's houſe, or ſuch a highway, there would be reaſon that the plaintiff muſt ſhew *a title*, and a ſpecial reaſon of the charge, becauſe it would be to impoſe a charge upon him againſt common right; but here it is to repair his own houſe, which of common right he is bound to do; and every body, by law, is ſo far bound to repair his houſe, that through want thereof another be not prejudiced. At common law, if there be two jointenants of a houſe, and it wants repairs, a writ *de reparatione faciendâ* will lie for the one againſt the other: ſo if the houſe of one be likely to fall, to the prejudice of another man's houſe, a writ *de domo reparandâ* will lie, and it is no matter whether it be an ancient houſe, or a new one: but if the one were an old ruinous houſe, and a new houſe be built near, it will not lie, becauſe the word *debet* in the writ would exclude him, and the word *ſolet* in the writ may be left out (*b*). If a leſſee for years build a houſe, it is waſte; and to let it fall is a new waſte (*c*). It was held on debate, that if one man have the upper rooms of a houſe, and another has the foundation and lower rooms, and the upper rooms be out of repair, the owner of the lower rooms has an action againſt him who has the upper rooms; and ſo it ſhall be *vice verſâ*, for non-repair of the foundation: and we ſay, the wall *ſolebat reparari*, which word is as ſtrong as *conſuevit*, and takes away all intendment or doubt that it was a new houſe: ſo is the caſe of *Palmer v. Hebblethwaite* (*d*); and the caſe of *Roſwell v. Pryor* (*e*) was after verdict, and would otherwiſe have been ill. * One was cutting down his hedge, and it fell upon the plaintiff's ground; it is no good plea to ſay, that it fell againſt his will; but the defendant ought to ſhew that he did what he could to hinder it, and that he removed it with all ſpeed (*f*).

Carth. 212. 451.

Vide ante, 20.

* [313]

Againſt this were quoted the caſe of *St. John v. Moody* (*g*). If an *aſſize* be for rent againſt a terretenant, the plaintiff is compellable to make a title; otherwiſe if it be brought againſt the perſon of the rent: if one nail boards to my window, I need not, in an action for the ſame, ſhew my *title*; but if a man who

Ante, 116. Vide 2. Lev. 148. 3. Keb. 528. 531. 1. Vent. 214. 319. 2. Vent. 138. 185. 288. 292. 8. Mod. 272. 10. Mod. 25. 11. Mod. 7. 12. Mod. 215. 509. Stra. 634. Ld. Ray. 613.

(*a*) Year-Book 35. *Hen.* 6. pl. 27. 27. *Hen.* 6. pl. 15.

(*b*) Regiſter, 153. b. 2. Inſt. 404. Moor. 374. 11. Co. 82.

(*c*) Kelway, 98.

(*d*) 3. Mod. 48.

(*e*) Ante, 116.

(*f*) Vide Year-Book 6. *Edw.* 4. Fitz. Abr. "Treſpaſs," 110.

(*g*) 1. Vent. 274.

has

TENANT *againſt* GOLDWIN.

Vide 2. Show. 243. 2. Cro. 43. 123. 3. Cro. 325. 499. 575. 2. Vent. 186, 187. 350. Vide ante, 19.

his ground cloſe to my houſe, in aſſerting his right, build in my light, there I muſt ſhew my right to have an action againſt him for it; upon which reaſon is the caſe of *Dent v. Oliver* (*a*), for hindering the plaintiff from taking toll in his fair, without ſhewing any *title* to it; good becauſe againſt a wrong-doer.

HOLT, *Chief Juſtice.* The caſe of *Sands v. Treſuſis* (*b*) is not like this; for there the *ſolebat* goes to the *currere*, which is the thing complained of; and *ſolebat* is of an uncertain ſignification, and properly goes to repeated acts; and it is ſaid the wall *ſolebat reparari*, and yet it is a permanent thing, and therefore it is very improper to ſay a permanent thing *ſolebat*. And he allowed, that formerly and ſtill there is a difference between charging *a wrong-doer*, and *the tenant of the land*; for to charge a terretenant, one muſt make title by grant or preſcription, but none need be made againſt a wrong-doer: and formerly it was thought neceſſary to maintain caſe againſt a terretenant for ſtopping a way, to ſhew *title*; but the contrary has been holden ſince (*c*), and that as well on *demurrer*, as *after verdict*; but I know no caſe where one puts a charge upon another, except it be of common right, but he ought to ſhew *title*, as in caſe of repairing one's houſe: but if I have a houſe of office in my ground walled, and no cellar is contiguous to it, and another digs a cellar cloſe to my wall, which ſtands well until you have dug your cellar, it ſeems hard to bring a greater charge upon me, by his digging his cellar contiguous to my wall, whereby my wall is in its nature become weaker. Suppoſe one man has a houſe, and a cellar contiguous to it, and one wall ſerves for both, and he ſells the cellar; who ſhall repair the wall? Or ſuppoſe this cellar was made after the vault, and the wall thereof; for the one party's making a wall, ſhall not take away the owner of the contiguous ſoil's liberty of digging a cellar; but ſuch digging ought not to bring a greater charge upon the other.

GOULD, *Juſtice.* Moſt certainly there are a great many caſes, that if a man declare that he ought to have common, &c. and it be againſt the terretenant, or the owner of the ſoil, there ought to be a *title* made (*d*), but latter caſes have gone otherwiſe (*e*). And here it is ſaid, "he ought to repair," and that word "*ought*" will bring the matter in evidence. The difference is between *a declaration* and *a plea in bar* (*f*).

(*a*) Cro. Jac. 43.
(*b*) Cro. Car. 575.
(*c*) Strode *v.* Burt, 4. Mod. 418.
(*d*) 1. Vent. 319, 356.
(*e*) Matthew *v.* Baker, and Plottney *v.* Slaughter, Hilary Term, 4. *Will. & Mary*, Roll. 1771.
(*f*) 2 Vent. 183. See Rider *v.* Smith, Trinity Term, 30. *Geo.* 3. where *per* BULLER, *Juſtice*, "The diſtinction is "between caſes where the plaintiff lays "a charge upon the right of the defend-"ant, and where the defendant himſelf "preſcribes in right of his own eſtate. "In the former caſe, the plaintiff is pre-"ſumed to be ignorant of the defendant's "eſtate, and cannot therefore plead it; "but in the latter, the defendant, know-"ing his own eſtate, in right of which "he claims a privilege, muſt ſet it forth." 3. Term Rep. 766.

And

TENANT *againſt* GOLDWIN.

* [314]

* And at another day, PER TOTAM CURIAM, The declaration is good; for there is a ſufficient cauſe of action appearing in it; but not upon the word *ſolebat*. If the defendant has a houſe of office incloſed with a wall which is his, he is of common right bound to uſe it ſo as not to annoy another. There is a great diverſity between a preſcription to put a charge upon a man to repair his fence, and to excuſe one from a treſpaſs; for ſuch charge muſt be by preſcription. But the reaſon here is, that one muſt uſe his own ſo as thereby not to hurt another; and as of common right one is bound to keep his cattle from treſpaſſing on his neighbour, ſo he is bound to uſe any thing that is his ſo as not to hurt another by ſuch uſer. If a man have two houſes, one of which has a houſe of office that is kept in by the wall of the ſame houſe from a cellar in the other, and he ſells the houſe to which the houſe of office belongs, the buyer is to keep it in good repair, ſo as not to prejudice the vendor's houſe; for he is ſo to uſe it as not to hurt another. Suppoſe one ſells a piece of paſture lying open to another piece of paſture, which the vendor has, the vendee is bound to keep his cattle from running into the vendor's piece; ſo of dung, or any thing elſe. If a man erect a houſe of office, to which there is contiguous a vacant piece of ground which is his, and by which the houſe of office is kept in; there, if he ſell the vacant ground, and the vendee dig a cellar in it, as he may do, there he muſt defend his cellar againſt the houſe of office. If a man build next to a vacant piece of ground of his own, and then ſell the new houſe, keeping the ground in his own hands, he cannot build upon the waſte ground ſo as to ſtop the lights of the houſe; for by ſale of the houſe, all the lights, and all neceſſaries to make them uſeful, paſs; for by ſale of the houſe, all the convenience it has will paſs; and as he himſelf cannot build to the prejudice of the new houſe ſo ſold, ſo cannot the vendee of the vacant ground do it: but if, in that caſe, he had ſold the vacant ground, without reſerving the benefit of the lights, the Court doubted, in that caſe, that vendee might build ſo as to ſtop the lights of the vendor, becauſe he parted with the ground without reſerving the benefit of the lights; for that caſe differs from that of *Palmer v. Fleeher*: and they ſaid they doubted of the caſe in *Keilw.* 98. where it is held, that the owner of the lower rooms in a houſe is bound to repair the foundation: there is indeed a writ in *Nat. Brevium*, 127. to a mayor, to command him that has the lower rooms, to repair the foundation; and him that has a garret, to repair the roof; but that is grounded upon a cuſtom: and the declaration would be better to ſay only, that the wall and houſe of office are the defendant's; and that, through default of him, the filth ran into your cellar.

Vide 1. Salk. 32. 360. Ante 245.

2. Lev. 122. 239. 248. 2. Lev. 194. 2. Mod. 55. 2. Salk. 459. Carth. 454, 455. Peph. 270. 2. Sid. 167. Raym. 87. Hob. 131. Ante, 226. Hutt. 136. 1. Bulſ. 126. 2. Keb. 825. 1. Cro. 419. Carthew, 454, 455.

And BY THE WHOLE COURT, judgment was unanimouſly given for the plaintiff.

A TABLE

A TABLE OF PRINCIPAL MATTERS CONTAINED IN THE SIXTH VOLUME.

A.

ABATEMENT.

1. IF two defendants ſever in their pleas, and the one is found guilty, and *an iſſue*, not helped by the *ſtatute of jeofail*, is joined for the other, and he is out of court by default, ſo as there can be no *repleader*, the writ or bill is neceſſarily *abated* thereby, and ſhall be *quaſhed*; for though in *treſpaſs* one defendant may be acquitted in part, and found guilty in part, yet the writ cannot *abate* as to one, and ſubſiſt as to the other, *Staple v. Heydon*, 10

2. After a plea in abatement there can be no *oyer* of the original, *Longville v. Hundred of Thiſtleworth*, 28

3. If a plaintiff ſtyle himſelf "*Gentleman*," and the defendant plead in abatement that he is no *Gentleman*; the plea is made good by a demurrer, *Batterſby v. Marſh*, 80

4. In replevin, "*property in a ſtranger*" may be pleaded in abatement, *Preſgrove v. Saunders*, 81

5. A defendant ſhall not have coſts on a judgment in his favour upon a demurrer to a plea in abatement, *Garden v. Exon*, 88

6. In replevin, if the defendant plead *in bar*, and demur to the replication in *abatement*, the plaintiff, after joinder in demurrer, ſhall have *final judgment* on the demurrer being over-ruled, *Crape v. Bilſon*, 102

7. Where matter of *abatement* is pleaded in *bar*, final judgment ought to be given, 102

8. In replevin, the plea of *priſel in autre lieu* is matter in abatement, *Crope v. Bilſon*, 103

9. Matter pleaded in bar ſhall be taken *in bar*, though the plea conclude in *abatement*, 103

10. Pre-

10. Precedent of a plea in abatement that the plaintiff had received the order of *knighthood*, *Lett v. Mills*, 105

11. A plea in abatement that the plaintiff is a knight is good, *Lett v. Mills*, 106

12. In a plea of abatement to the perſon of the plaintiff, a *venue* need not be laid, 106

13. A plea in abatement in diſability of the plaintiff, muſt ſhew that the diſability exiſted at the time the action was brought, *Lett v. Mills*, 106

14. If matter of fact be pleaded in abatement, and found againſt the defendant, judgment final ſhall be given, *Anonymous*, 114

15. If a man ſued by the name of *Benjamin* plead in abatement that he was baptized by the name of *John*, with a *traverſe* that the ſaid *John* was ever known by the name of *Benjamin*, the plea is bad, *Walden v. Holman*, 115

16. Pleas in abatement of the juriſdiction, as well of inferior as ſuperior courts, muſt be veriſied on oath, and tendered in perſon while the Court is ſitting, *Sparkes v. Wood*, 146

17. Abatement muſt be pleaded within four days of the expiration of the Term in which the declaration is delivered, *Anonymous*, 175, *notis*

18. If excommunication be pleaded in diſability of the plaintiff, it muſt not only be ſigned by counſel, but be under ſeal, 181

19. There can be no ſuch thing as a demurrer in abatement, *Anonymous*, 195

20. Same point, *Docmanny v. Davenant*, 198

21. On a *ſcire facias* againſt terre-tenants without naming them, if it be pleaded in *abatement* that *A.* is terre-tenant, and not ſummoned, the defendant ſhould not *anſwer over* until *A.* be ſummoned, but the writ ſhall not be abated, *Adams v. Savage*, 199

22. If an adminiſtrator bring a *ſcire facias* on a judgment by his inteſtate, to warn the tenants, and the ſheriff return ſeveral *terre-tenants*, they cannot all appear and plead in *abatement* jointly, *Adams v. Savage*, 226

23. If, on a *ſcire facias* againſt terre-tenants, the ſheriff return among others *John* and *Sarah* his wife, as tenants, a plea in abatement that *G. T.* is tenant is bad; for it is pleading "*non-*"*tenure*" by implication, *Adams v. Savage*, 225

24. In an ejectment brought by an adminiſtrator *de bonis non*, if the plaintiff die after the writ of *extendi facias*, the writ abates, 300

ACCESSARY.

1. In treaſon and treſpaſs there are no acceſſaries; all who are guilty are principals, *Reg. v. Tracy*, 32

2. If a thing be made felony, all acceſſaries before and after are felons; and if an offence which before was felony be made treaſon, thoſe who would have been acceſſaries to the felony will be principals in the treaſon, 32

3. An indictment for a treſpaſs may either charge the offender generally as a principal, or ſpecially ſtate the facts, 33

AC ETIAM.

1. If a recovery in an *indebitatus aſſumpſit* be for more than is mentioned in the *ac etiam* in the writ, the plaintiff cannot level the ſum recovered with that in the *ac etiam* by entering a *remittitur* on the record for the reſt, *Thompſon v. Collins*, 266

2. Bail are not anſwerable for more than is mentioned in the *ac etiam*, *Garibaldo v. Cagnoni*, 267

ACCEPTANCE.

If a *feoffment* be pleaded in ſatisfaction of *a bond*, the *acceptance* of the bond in ſatisfaction muſt be laid in the county where the feoffment was made, *William v. Farrow*, 82

A TABLE OF PRINCIPAL MATTERS.

ACCOUNT.

If an account be ſtated between *A.* and *B.* the account is the property of him who is intitled to the balance, *Reg. v. Criſp*, 175

ACTION.

1. An action on the caſe for a malicious proſecution will not lie, if there be *probable cauſe* for the proſecution, *Anonymous*, 25

2. Where-ever a ſtatute commands an act to be done, or prohibits the doing of it, and an advantage is loſt to, or injury received by, another perſon, by the doing or not doing of the act commanded or forbidden, an action will lie, *Anonymous*, 27

3. A perſon in execution cannot be charged with a civil action without leave of the Court, *Anonymous*, 88

4. A debt of four pounds cannot be divided into ſeveral actions, in order to ſue for it in an inferior court, *Catchmade's Caſe*, 90

5. An action will not lie againſt a ſheriff for taking *inſufficient bail*; but if he have not the defendant on the return of the writ, he may be amerced, unleſs he has aſſigned the bail bond, *Grovenor v. Soam*, 122

ADDITION.

1. In an indictment for a treſpaſs, "*ſervant* to ſuch a perſon" is a good addition, *Reg. v. Hoſkin*, 58

2. The defendant's *addition* need not be mentioned in a *pluries homine replegiando*; for the *original writ* is *vicontiel*, and as ſuch writs do not require addition, it need not be in the *alias* and *pluries*, *Lord Banbury v. Wood*, 84

3. If there be father and ſon of the ſame Chriſtian name, a declaration againſt the ſon *in cuſtodiâ marſchalli* is good, without diſtinguiſhing him by the addition of "*junior*," *Lepiot v. Brown*, 198

ADMINISTRATION.

1. In what caſes an adminiſtratrix ſhall pay coſts, *Jenkin v. Plumbe*, 91, 181.

2. If a plaintiff recover againſt an adminiſtrator and die, his executor may maintain debt on the judgment upon a ſuggeſtion of a *devaſtavit* by the defendant, in the life-time of the teſtator, *Berwick v. Andrews*, 126

3. Archdeacons have only a *preſcriptive* and not a *common right* to grant adminiſtration; and a judgment is *bona notabilia* in the place where it is given: if therefore a judgment be given at *Weſtminſter*, and the adminiſtrator of the plaintiff bring a *ſcire facias* againſt the terre-tenants of the defendant, ſtating that the inteſtate died on ſuch a day, and that adminiſtration was committed to him by the *Archdeacon of Dorſet*, the Court will *ex officio* take notice, that the adminiſtration, as to this judgment, is *void*; and the adminiſtrator ſhall take *nothing by his writ*, *Adams v. Savage*, 134

4. If an adminiſtrator bring a *ſcire facias* on a judgment recovered at *Weſtminſter*, ſtating himſelf "adminiſtrator," and reciting, as his title to ſue, letters of adminiſtration granted by *the Archdeacon of Dorſet*, the error of ſuing for *bona notabilia* in one dioceſe on an adminiſtration granted in another, is not cured by the terre-tenants pleading to *the merits*, and omitting to traverſe the validity of the adminiſtration; nor can the words, "by the "Archdeacon of *Dorſet*," be rejected as ſurpluſage; but if the plaintiff had only alledged generally, that "he was "adminiſtrator of the goods, &c." it would have been good, *Adams v. Savage*, 135

5. The ſtatute 8. and 9. Will. 3. c. 11. does not extend to executors and adminiſtrators, 137 *notis*

6. An ordinary in *Ireland* may commit adminiſtration of goods in *England*, *Anonymous*, 145

7. An adminiſtrator while in cuſtody on an arreſt for a debt due from himſelf, cannot

cannot give a good warrant of attorney to confeſs a judgment on a debt due from his inteſtate, *Sexon's Caſe*, 164

8. If an adminiſtrator bring a *ſcire facias* on a judgment by his inteſtate to warn the tenants, and the ſheriff return ſeveral *terre-tenants*, they cannot all appear and plead in *abatement* jointly, *Adams v. Savage*, 226

9. In debt by an adminiſtrator upon a bond againſt an heir, he need not ſhew how the defendant is heir, *Denham v. Stevenſon*, 241

10. An adminiſtrator may, in an action of debt againſt an heir on the bond of his anceſtor, declare generally that adminiſtration was in *due manner* committed to him by ſuch a *peculiar*, without ſhewing the right of the *peculiar* to grant adminiſtration, *Denham v. Stevenſon*, 242

11. An adminiſtration may be granted during the abſence of an executor beyond the ſeas, *Slater v. May*, 304

ADMIRALTY.

1. If a libel be entered in the court of admiralty, and proceſs iſſues to force the defendant to appear, the court of king's bench will not entertain a motion for *a prohibition* until after appearance; although it may *primâ facie* ſeem that the court of admiralty has not juriſdiction; for until appearance, the *real merits* of the cauſe cannot be before the court, *Trantin v. Watſon*, 12

2. But under particular circumſtances, a prohibition has been granted to the court of admiralty before appearance, *Sands v. Eaſt India Company*, 12

3. If the captain of an Engliſh ſhip captured by an enemy at ſea, ranſoms her and becomes hoſtage for the payment of the ranſom, he may proceed in the admiralty againſt the ſhip and cargo for the ranſom money, *Tranter v. Watſon*, 12

4. If a ſhip be taken as prize and condemned, and the goods ſold, and afterwards the firſt owner ſues the vendee for the goods, *he* may ſue *him* in the admiralty, *Tranter v. Watſon*, 12

5. The ſentence of a court of admiralty beyond ſea ſhall be executed in England, 26

6. The crew of a ſhip may join in a ſuit in the court of admiralty for their wages, *Ewer v. Jones*, 26

7. By 4. Ann. c. 16. ſ. 17. a ſuit in the court of admiralty for ſeamen's wages muſt be commenced within ſix years after the cauſe of action ariſes, or if the party be a minor, or *feme covert*, inſane, impriſoned, or beyond the ſeas, within ſix years after his attaining full age, being diſcovert, of ſane memory, releaſed, or returning from beyond ſea, 26 *notis*

8. A ſentence in the admiralty in a matter of which they have juriſdiction binds the property, 26

9. A prohibition will not lie to the court of admiralty for refuſing a plea of the ſtatute of Limitations, if it be badly pleaded, *Ewer v. Jones*, 26

10. If the court of admiralty refuſe to receive a plea which is good by the *civil law*, it is good ground for an appeal, 26

11. The court of admiralty has juriſdiction in the caſe of an *hypothecation bond*, given by the maſter of a ſhip for neceſſaries occaſioned by diſtreſs *at ſea*, although the contract was made *on land*, *Johnſton v. Shepney*, 79

12. If the court of admiralty proceed againſt both *the owners* and *the ſhip*, a prohibition lies as to the owners, 79

13. The juriſdiction of the admiralty ariſes from the *locality of the act*, but the juriſdiction of the ſpiritual court ariſes from the *nature of the act*, *Collins v. Jeſſott*, 156

14. If part of the owners of a ſhip diſſent from a voyage propoſed by the reſt, the diſſenting owner may arreſt the ſhip in THE ADMIRALTY, and oblige the aſſenting owners to give *caution*, *More v. Robotham*, 162

15. Same point, *Dimock v. Chandler*, 162 *notis*

16. Caſes

16. Cases cited in which this point has been recognized as law, 162 *notis*

17. The admiralty is a court time out of mind, and has juriſdiction over *ſeamen's wages*, by ancient cuſtom, *per* HOLT, *Chief Juſtice*, 205

18. If the owner of a ſhip contract with ſeamen to go the voyage, and, in order to haſten the outfit, they do work on board the ſhip while ſhe continues in harbour, and the owner afterwards diſmiſſes the ſeamen without going the voyage, they may ſue in THE ADMIRALTY for their wages, although the work was done within the body of a county, *Wells v. Oſmond*, 238

19. The true reaſon why ſeamen may ſue in the admiralty for their wages, though the contract be on land, is, that there the ſhip itſelf is made liable to them, and they may all join in the ſuit, neither of which may be done at common law, *Wells v. Oſmond*, 238

20. But *a pilot* who is ſent for from *Graveſend*, and goes from thence on board a ſhip lying in *Sea Reach*, and pilots her from thence to her moorings at *Deptford*, though a *mariner*, cannot ſue in THE ADMIRALTY for the pilotage; for both the contract is made and the work done within the body of a county, *Roſs v. Walker*, 238 *notis*

ALMANACK.

1. The Almanack is part of the law of England, of which the Court muſt take judicial notice, *Reg. v. Dixon*, 42

2. Same point, *Harvey v. Broad*, 196

3. The Almanack which is annexed to the *Common Prayer Book* is legal evidence, 81

4. Same point, *Davy v. Salter*, 251

AMENDMENT.

1. Upon the amendment of a plea in paper, the party is entitled to coſts, *Staple v. Heydon*, 2

2. If a releaſe be pleaded but no *venue* laid, it cannot be amended after demurrer and joinder entered on the roll, *Anonymous*, 84

3. A miſtake in the return of a *ſcire facias* cannot be amended, *Anonymous*, 86

4. A *mandamus* may be amended before return made, *Reg. v. Clitheroe*, 133

5. The miſ-priſion of the clerk in making out a writ of error may be amended, *Kent's Caſe*, 138

6. On a writ of error on a judgment from *Wales*, a *certiorari* to inform the Court may iſſue, although the record has been before amended, *Lewis v. Jones*, 138

7. An inferior court may amend errors in fact in the record by the minute book, *Gawdy v. Pickerſdale*, 165

8. If a writ of error be brought on a judgment in ejectment; and, on neglect to aſſign error, the defendant bring a *ſcire facias quare executionem non*, and recite the judgment to be of *two* meſſuages, when it was only of *one* meſſuage, the variance cannot be amended after "*nul tiel record*" pleaded, *Buxom v. Hoſkins*, 263. 310

9. In an information filed *ex officio*, if the *venire facias* be returnable on *Monday* after the three weeks of *St. Michael*, and the *diſtringas* awarded on the roll with a *niſi prius* on *Saturday*, after the morrow of *All Souls*, but the *diſtringas*, through miſtake, be *teſted* the day after the return of the *venire facias*, it is *a diſcontinuance of proceſs*; but although, being a criminal caſe, it is not within the *ſtatute of Jeofails*, yet it may after verdict be amended at *common law*, *Reg. v. Tutchin*, 269

10. A miſ-priſion of the clerk in a *writ of enquiry* in the common pleas may be amended in the king's bench; and the Court will order the roll to be brought up, *Michel v. Waldron*, 306

11. A *miſnomer* in a bail bond, and a *reddidit ſe* variant from the firſt writ, cannot be amended, *Bernardiſton v. Sheriff of Middleſex*, 309

APOTHECARY.

The proper buſineſs of *an apothecary* is to make and compound or prepare the preſcriptions of *the doctor*, purſuant to his directions, *The College v. Roſe*, 44

APPEAL.

If an *appeal of murder* be removed by *habeas corpus* and *certiorari* into the king's bench, and the appellee be admitted to bail, he cannot be diſcharged on appearing to his recognizance and producing a releaſe from the proſecutor, but muſt be arraigned upon the record, and then plead the *releaſe* or *autrefois acquit*, *Culliford's Caſe*, 219

APPEARANCE.

1. The parties to an action are demandable for not appearing on *a day given*, whether the day be given on demurrer, or on iſſue joined, *Staple v. Heydon*, 6

2. If an attorney appear for a defendant, the appearance is good, although the attorney had no warrant for ſo doing, *Anonymous*, 16

3. If an attorney undertake to appear, he ſhall be compelled to file an appearance, *Anonymous*, 42

4. Same point, *Wigg v. Rock and his Wife*, 86

5. In an action againſt huſband and wife, the huſband muſt file appearance for his wife, 86

6. If a defendant remove an indictment by *certiorari*, he muſt appear during the term in which the writ is returned, *Anonymous*, 221

APPRENTICE.

1. An apprentice during the continuance of the indentures is the ſervant of the maſter, to whom whatever he earns belongs; and thereupon if an apprentice be preſſed and earn *ſeamen's tickets*, the maſter may bring *trover* for them, *Barton v. Dennis*, 69

2. Indentures of apprenticeſhip muſt be enrolled, 69

3. If a maſter licenſe his apprentice to leave him, he cannot afterwards recall that licence, *Anonymous*, 70

4. If a maſter bring an action of covenant againſt his apprentice for leaving his ſervice at ſuch a time, and the defendant juſtifies by virtue of *a licence* at that time, the maſter cannot give evidence of a leaving him at another time, 70

5. An *indictment* will not lie againſt a man for enticing an apprentice to leave his maſter's ſervice, for it is of a private nature and to the prejudice of a ſingle perſon only; the remedy is by *action on the caſe*: but to perſuade a ſervant or apprentice to embezzle his maſter's goods, is an indictable offence, *Reg. v. Daniel*, 99

6. An apprentice muſt be by deed, and cannot be diſcharged from his indentures but by deed, *Reg. v. Daxiel*, 182

7. If a ſon be bound apprentice to his father, and the father give up his indenture to the ſon, and hires him out in another pariſh where he ſerves a year, he is ſettled in the father's pariſh, for the indentures not being cancelled, the apprenticeſhip continues, *Reg. v. Thurſley*, 191

8. If a maſter give a bond to make his apprentice free of the city at the end of ſeven years, *if requeſted*, the defendant may plead to an action of debt on this bond, "that at the end "of ſeven years or after he was not "requeſted, &c." for he was not bound to do it, except upon requeſt made at the time appointed for the performance, *Fitzhugh v. Dennington*, 227. 259

9. To perſuade an apprentice to embezzle his maſter's goods is an indictable offence, *Reg. v. Collingwood*, 288

ARCHDEACON.

1. Archdeacons have only a *preſcriptive* and not a *common right* to grant adminiſtration, *Adams v. Savage*, 134

2. An archdeacon is exempted from ſerving the office of *expenditor* of marſh lands, *Dr. Lee's Caſe*, 140 *notis*

3. An archdeacon is taken notice of in law as *oculus epiſcopi*, 242

ARREST.

1. If a *feme covert* be arreſted, ſhe ſhall be diſcharged on filing common bail; but in an action againſt huſband and wife, if the huſband be arreſted, he ſhall not be diſcharged unleſs he file bail for himſelf and his wife likewiſe, *Corniſh v. Marks*, 17

2. A priſoner for debt arreſted on an eſcape warrant, cannot be diſcharged by paying money into court, *Hothersſhell v. Bows*, 21

3. A defendant indicted cannot be arreſted as he is going to court to plead to the indictment, *Garibaldo v. Cagnoni*, 90

4. A priſoner who has eſcaped may be arreſted on *a Sunday* either by the officer on *freſh purſuit*, or by virtue of an *eſcape warrant*, *Parker v. More*, 95

5. But if *A.* be arreſted at the ſuit of *B.* and *C.* lodges a detainer againſt him, and he is diſcharged from the ſuit of *B.* he cannot be arreſted again at the ſuit of *C.* on *a Sunday*, for this is an *original taking*, and not a *re-taking* after an eſcape, *Atkinſon v. Jameſon*, 95 *notis*

6. If a bailiff arreſt a perſon without warrant on *a Sunday*, and detain him by virtue of a warrant procured the next day, the Court will grant an *attachment* againſt the officer, but will not diſcharge the priſoner; for he may have an action for the falſe imprisonment, *Lidford v. Thomas*, 95

7. If a perſon be arreſted after the writ is returnable, the officer cannot legally detain him, though for the ſhorteſt time, until the writ be continued, *Loveridge v. Plaiſtow*, 96 *notis*

8. After an arreſt the bailiff ought to carry the party to the next gaol, if he do not deſire to be carried to a place in order to ſend for his friends, *Anonymous*, 96

9. In what caſes a married woman, on being arreſted, ſhall be diſcharged on common bail, *Anonymous*, 105

10. If bailiffs break outward doors to execute civil proceſs, the Court will not grant an attachment againſt them, but will leave the party to his remedy by action of treſpaſs, *Anonymous*, 105

11. An arreſt muſt be by corporal ſeizing or touching the defendant's body, and therefore if a bailiff only pronounce words of arreſt and ſhew his warrant, and the defendant eſcape, the Court will not grant an *attachment* for a *reſcue*; for he was not legally arreſted, *Genner v. Sparks*, 173

12. A bailiff, after arreſt, may, if the priſoner eſcapes, break open doors to retake him, *Genner v. Sparks*, 174

13. A bailiff, in the execution of *meſne proceſs*, may break open the door of a lodger's apartment, if he has firſt gained a peaceable entrance at the outer door of the houſe, *Lee v. Ganſel*, 174 *notis*

14. If a bailiff has a warrant to arreſt a man, and another hinder him from doing it, there being no actual arreſt, it is not a *reſcous* but a *contempt*, *Powell v. Ball*, 210

15. An arreſt muſt be made by the authority of the bailiff, but he need not be the hand that arreſts, nor in the preſence, nor actually in ſight, nor within any preciſe diſtance, of the perſon arreſted, *Blaich v. Archer*, 211 *notis*

16. If a *capias* be returnable in three weeks after Eaſter, *viz.* on *Sunday*, *April* 29, and the defendant be arreſted at eight o'clock in the morning of the next day, the arreſt is illegal, for it was made after the writ was returnable, *Loveridge v. Plaiſtow*, 252 *notis*

17. It is illegal to arreſt a perſon on a writ filled up after it was ſealed, *Anonymous*, 310

ASSAULT.

1. What ſhall be conſidered in law an aſſault and battery, *Cole v. Turner*, 149

2. *Son aſſault* may be pleaded in an action, and given in evidence on an indictment, *Reg. v. Coteſworth*, 172

3. To an action of aſſault and battery, A PLEA of "not guilty within ſix "years" is bad on a general demurrer; for 21. Jac. 1. c. 16. limits ſuch actions to four years, *Blackmore v. Tidderley*, 240

ASSETS.

1. If a jury find *aſſets*, without finding to what value, the verdict is inſufficient, and a *venire de novo* ſhall iſſue, *Staple v. Heydon*, 3

2. If an executor ſuffer judgment to go by default, it is an admiſſion of aſſets, *Treil v. Edwards*, 308

ASSUMPSIT.

1. If the holder of a bill of exchange for 60l. ſend his ſervant with it to the payee for payment, and the payee give the ſervant a draft for it on his banker for 100l. and the banker writes off 60l. from the 100l draft; but the ſervant, inſtead of receiving the money, takes a draft on a merchant, who immediately afterwards becomes inſolvent and refuſes to pay the note, the act of the ſervant ſhall not, in ſuch caſe, bind his maſter; for the ſervant was ſent to receive the money from the payee, and not the note from the banker, and therefore the maſter may recover the ſixty pounds from the banker in an action of *aſſumpſit*, as for money had and received to the uſe of the maſter from the payee of the bill, *Ward v. Evans*, 36

2. If *A.* deſire *B.* to cure the horſe of *C.* and promiſes to pay him ſo much, an *indebitatus aſſumpſit* will lie againſt *A. Jordan v. Thompkins*, 77

3. An *indebitatus aſſumpſit* will not lie to recover money won at play, *Smith v. Mitery*, 128

4. A declaration in *aſſumpſit* by an *aſſignee* ought to ſtate the promiſe as made to the *bankrupt*, unleſs an *expreſs* promiſe is made to the aſſignee, *Anonymous*, 131

5. An executor cannot maintain *aſſumpſit* for money taken out of the teſtator's room after his death, *Clark v. Dealey*, 151

6. To *aſſumpſit* in the king's bench, the defendant cannot plead *another action depending* for the ſame cauſe in the common pleas, *Rowſton v. Combat*, 137

7. If an executor give a perſon a ſum of money on his promiſing to deliver up certain writings, then in his poſſeſſion belonging to the teſtator, and he afterwards refuſes to perform his promiſe, the executor may recover back the money ſo paid by *indebitatus aſſumpſit*, *Holmes v. Hall*, 161

8. If *A.* has a rent charge iſſuing out of the lands of *B.* and *B.* in conſideration that *C.* will indemnify him againſt all diſtreſſes taken by *A.* promiſe to pay *C.* ſuch a ſum of money, this is not a ſufficient conſideration to ſupport an *aſſumpſit*, unleſs it appear that *A.* had a right to diſtrain, *Strong v. Courtney*, 266

9. *Aſſumpſit* lies on a promiſe to deliver a grain of rye on *Monday*, and an additional two grains, in arithmetical progreſſion, on every *Monday* during the year, *Thornborough v. Whiteacre*, 305

10. So an *aſſumpſit* to pay for *a horſe* a barley corn a nail, doubling every nail, is good, *James v. Morgan*, 305 *note*

ATTACHMENT.

See FOREIGN ATTACHMENT.

1. An attachment lies againſt an attorney for appearing for a defendant in an action without a warrant for that purpoſe, *Anonymous*, 16

2. If an attorney in an action of ejectment procure a perſon to go to the premiſes demiſed, to aſſume the name and character of the *tenant in poſſeſſion*, and

and then ſend another perſon to ſerve the declaration on him, and to make an affidavit of ſuch ſervice, and by ſuch fictitious proceedings obtain judgment againſt the *caſual ejector*, and thereby get into fraudulent poſſeſſion, yet the Court will not grant an *attachment* againſt THE ATTORNEY in the firſt inſtance, but will grant a rule for him to ſhew cauſe why an attachment ſhould not go, and why he ſhould not anſwer the matter of the affidavit; and on affidavit of perſonal ſervice of the rule, or if he cannot be found, on affidavit of that fact, and that due diligence has been uſed to find him, they will grant an attachment, *Holderſtaffe v. Saunders*, 16

3. In proceedings on an *attachment of privilege* brought by THE MARSHAL of the king's bench priſon, there ſhall be no *attorney*, for THE MARSHAL is always, by intendment of law, preſent in the court, *Anonymous*, *ib.*

4. At what time the Court will grant *an attachment* for not returning a *mandamus*, *Reg. v. Mayor of Thetford*, 25

5. If poſſeſſion under a writ of *habere facias poſſeſſionem* be given about nine o'clock in the morning, and the party is forcibly turned out of poſſeſſion in the afternoon of the ſame day, the Court will grant a rule to ſhew cauſe why *an attachment* ſhould not iſſue, in order to diſcover whether the outter was in *contempt* of the proceſs of the law, *Kingſdale v. Mann*, 27

6. If, on interrogatories exhibited, the examinant confeſs that a *copy of a writ* was ſhewed to him, and that he ſpoke contemptuouſly of it, an *attachment* lies, although he did not know the contents of it, or out of what court it had iſſued, *Reg. v. Creſs*, 44

7. An attachment lies againſt a perſon for knowingly arreſting an indictee, as he is going to court to plead to the indictment, *Garibaldo v. Cagnoni*, 90

8. An attachment lies againſt a ſheriff's officer for arreſting a perſon on a *Sunday* without a warrant, and procuring a warrant the next day to detain him, *Lidford v. Thomas*, 96

9. The Court will not grant an attachment againſt bailiffs for breaking doors to execute proceſs, *Anonymous*, 105

10. The Court will not grant an attachment in the firſt inſtance on *affidavit* of a reſcue; but if the ſheriff return a *reſcue*, that is of itſelf a *conviction*, and the attachment will go of courſe, *Anonymous*, 141

11. The Court will not grant an attachment for a reſcue, if it appear that the party was not legally arreſted, *Genner v. Sparks*, 173

12. An attachment lies againſt a whole county for diſobeying an order of the court of king's bench made on an indictment for not repairing a public bridge, and any one or more individuals of the county may be apprehended on it, and made to anſwer for the whole county, *Reg. v. Wills*, 307

ATTAINDER.

If a *father* bring a writ of error to reverſe the attainder of his *ſon*, and a rule for its reverſal be obtained, on the confeſſion of the attorney general, the Court, though in the reign of a ſubſequent king, will order the record of reverſal to be made up after the death of the parties, on producing the writ, and the confeſſion of error thereon, *Lord Mohun's Caſe*, 59

ATTORNEY.

1. If an attorney appear for a defendant without a warrant for ſo doing, the defendant, if thereby injured, may have an action againſt the attorney, but the appearance is good, *Anonymous*, 16

2. If an attorney procure a declaration in ejectment to be delivered to a fictitious perſon as tenant in poſſeſſion, and by affidavit of ſervice obtain judgment againſt the caſual ejector, and thereby get fraudulent poſſeſſion of the premiſes, the Court will grant a rule for an attachment, *Holderſtaffe v. Saunders*, *ib.*

3. An attorney cannot appear on the part of *the marſhal* of the king's bench, on an attachment of privilege, *Anonymous*, 16

4. A *mandamus* lies to reſtore a perſon to the office of attorney of an inferior court, *White's Caſe*, 18

5. If, before a writ be taken out, an attorney promiſe to appear to it, and it is afterwards taken out, and ſhewed to him, he ought to appear, *Anonymous*, 42

6. An attorney may enter a *remittit damni*, but not a *retraxit*, *Lamb v. Williams*, 82

7. An attorney muſt be preſent at the executing of a warrant of attorney to confeſs a judgment by one under arreſt by proceſs from an inferior court, *Inman v. Crew*, 85

8. A warrant to confeſs a judgment in the court of common pleas is well executed in the preſence of an attorney of the court of king's bench, and *vice verſa*, *Inman v. Crew*, 85

9. An attorney need not be preſent on executing a warrant of attorney to confeſs a judgment in an inferior court, *Inman v. Crew*, *ib.*

10. But if a perſon be in cuſtody by virtue of proceſs from an inferior court, an attorney muſt be preſent at the execution of a warrant of attorney to confeſs a judgment in the inferior court, *Inman v. Crew*, *ib.*

11. If an attorney undertake to appear and accept a declaration *de bene eſſe*, the plaintiff, on the attorney's refuſing to appear, cannot ſign judgment for want of a plea, *Wigg v. Rook*, 86

12. An attorney who undertakes to appear ſhall be compelled to appear, *Wigg v. Rook*, *ib.*

13. Same point, *Anonymous*, 42

14. Formerly *a bill* againſt an attorney could not be filed except in full Term, *Anonymous*, 106

15. But now a bill may be filed againſt an attorney in Vacation as well as in Term-time, *Lane v. Wheate*, 106 *notis*

16. But if a bill be filed againſt an attorney in Vacation-time, other than to avoid the ſtatute of Limitation, the plaintiff will not be allowed his coſts, if the action be ſettled before the enſuing Term, 166 *notis*

17. If a bill be filed againſt an attorney in Vacation, the day of filing is may be inſerted in the memorandum, *Deaſworth v Bowen*, *ib.*

18. If an attorney of the common pleas be ſued in the king's bench, and plead his privilege, he ſhall not be *ſworn* to his plea, nor need the *writ of privilege* be ſet out at large, *Anonymous*, 114

19. A bill may be filed againſt an attorney any day within the Term, *Anonymous*, 175

20. The Court may proceed in a ſummary way to ſtrike an attorney off the roll, *Anonymous*, 187

21. By 1. Hen. 5. c. 4. no under-ſheriff ſhall act as an attorney in the king's courts during the time that he is in office, on pain of being ſtruck off the roll, *Anonymous*, 192

22. The manner in which an attorney may plead his privilege, *Cockreſt v. Smith*, 263

23. An attorney who makes a nominal leſſee in ejectment ſhall be anſwerable for coſts, *Anonymous*, 309

AVERMENT.

1. What ſhall be conſidered as an immaterial or impertinent averment, 3

2. If an action be brought in an inferior court, that which is the *giſt* of the action muſt be averred to be within the juriſdiction, *Shanyon v. Davis*, 224

3. In what manner an averment is neceſſary where the defendant pleads privilege, *Phips v. Jackſon*, 305

AVOWANT.

In replevin, if the avowant ſtate a particular eſtate, it cannot, after nonſuit, be objected that he has not ſhewn its commencement,

mencement, or ſtated a *ſeiſin in fee*, *Anonymous*, 223

AWARD.

1. An award that "all ſuits between the "parties ſhall ceaſe," is final; for it ſhall be taken as a determination of the right of action, *Squire v. Greville*, 34

2. An award that one of the parties "ſhall "pay ten pounds in full of all demands, "and the other give him a general re-"leaſe," is good; for it ſhall be intended in full of all demands to the time of the ſubmiſſion, and not to the time of payment, *Squire v. Greville*, 35

3. In debt, on an award made on a ſubmiſſion bond, to ſtand to the award, ſo as it be ready to be delivered at ſuch a time, a replication, after "no award" pleaded, ſetting forth an award, is good, although it do not ſtate that it was ready to be delivered at the time, *Robinſon v. Calwood*, 82

4. If a bond of arbitration be conditioned "ſo as to be ready to be delivered "to the parties on or before ſuch a "day," the arbitrators may make a *parol award*; for ſuch an award is capable of being *delivered*, and the words do not neceſſarily import that it muſt be in *writing*, *Oates v. Brombil*, 160. 176

5. In debt, on a bond of arbitration, an averment that the award was ready to *be delivered*, is ſufficient, without ſaying *to both parties*, *Oates v. Brombil*, 177

6. An award ordering "the ſaid *A.* to "pay to the ſaid *B.* the *ſaid* ſum of ten "pounds," is good, though no ſum of ten pounds was mentioned before, *ib.*

7. Precedent of a declaration in debt on a bond of arbitration, with plea, replication, &c. *Winter v. Garlick*, 195

8. An award that the party ſhall pay the coſts of a ſuit depending in an inferior court is void for uncertainty, *Winter v. Garlick*, 195

9. But an award that one party ſhall pay to the other all ſuch monies as he has expended about the proſecution of a ſuit, is good, *Hanſan v. Leverſedge*, 195 *notis*

10. So an award that the defendant ſhall pay, as the plaintiff and his attorney by bill or oath ſhall make appear, is good, *Linfield v. Ferm*, *ib. notis*

11. If coſts are awarded generally, but no perſon appointed to tax them, the Court may order the maſter to do it, *Dudley v. Nettleſield*, *ib. notis*

12. Arbitrators are not bound to refer the taxation of coſts to the officer of the court, but they may award a groſs ſum for coſts, *Shepherd v. Brand*, *ib.*

13. A defendant may plead the award of a *collateral thing* in *ſatisfaction*, without averring that the award is performed, *Boiſloe v. Bailey*, 221

14. A declaration in debt, on an arbitration bond, ſubmitting a treſpaſs, need not notice the *vi et armis*, *ib.*

15. On an award that *A.* ſhall give a dinner to *B.* on *Wedneſday* or *Thurſday*, notice is neceſſary, *ib.*

16. In pleading the award of a collateral thing, *quære* if a *tender* ſhould be ſtated, *ib.*

17. An award that *jointenants* ſhall make *partition* by mutual conveyances, is good, although it do not point out what part each of the parties is to have, *Knight v. Burton*, 231

18. An award that "whereas ſo much "money has been diſburſed *as in al-"lodged*, is good, 232

19. An award that a ſuit between the parties in chancery ſhall be *diſmiſſed*, is good; for it ſhall be taken to mean that the ſuit ſhall ceaſe *for ever*, and therefore final, *Knight v. Burton*, *ib.*

20. It is a rule in awards that are ſtated to be made "*of and upon the premiſes*," that if the words uſed in them be in their own nature more comprehenſive, and ſo extendible to things not within the ſubmiſſion, yet they ſhall be intended

tended that there was no other matter between the parties but what was submitted, *Knight v. Burton*, 233

21. In debt on bond for performance of an award, it is not necessary to state the *date of the award*; for if it be alledged to have been made on a day which is within the time of the submission, it is sufficient, *Arnote v. Breame*, 244

22. On a submission to arbitration respecting scaffolds newly erected within such a liberty, an award made *de et super præmissis* is good, although it do not aver the scaffolds to be within *the liberty*, or to have been *newly erected*, *ib.*

23. If *A.* erect scaffolds on his own ground, and thereby commit *a nusance* to *B.* and arbitrators award, that the scaffolds shall be removed, the award is sufficiently certain, though it do not say *by whom*; for it shall be intended by *A.* on whose ground they are erected, *Arnote v. Breame*, 245

B.

BAIL.

1. There must be special bail in trover, *Bangley v. Titcombe*, 14

2. If exception be taken to bail, and new bail is thereupon put, there must be notice thereof given; but if new exception be taken, *quære* if that will not cure the want of notice, *Anonymous*, *ib.*

3. If the same bail which were taken by the sheriff be put in to the action, the plaintiff cannot except against them, *ib.*

4. In debt on bond, bail must be put in before any motion can be made to stay proceedings on payment of principal, interest, and costs, *Anonymous*, 11

5. If a prisoner, in an action of debt on bond, take the benefit of an insolvent act, the bail are discharged, *Noell v. Gray*, 22

6. So if a prisoner who has been discharged under an insolvent act give bail, and on a confession of the action be charged in execution, and the plaintiff sues the bail, and they surrender the principal, they shall be discharged, 22

7. There are twenty days allowed to except against bail after notice given, *Anonymous*, 24

8. Bail cannot justify at chambers, except in Vacation, or by consent, *Anonymous*, 24

9. Upon putting in bail, it is not enough to give notice of their being put in, but it ought to be of their names, places of abode, and trade, that the plaintiff may know how to enquire after them, *Anonymous*, 25

10. There ought not to be a stay of proceedings on the bail-bond upon bringing principal and interest and costs into court after notice of trial, without it be brought within such time as the plaintiff may not be delayed in going to trial, *Butler v. Rolfe*, 25

11. If a writ of error be brought in the king's bench on a judgment in debt on bond in the common pleas, bail must be filed pursuant to the statute, *Scott v. Brace*, 38

12. Where a plaintiff, in order to hold a defendant to bail, has sworn positively to the debt, this affidavit cannot be explained or contradicted, *Emmerson v. Hawkins*, 63 *notis*

13. If the affidavit to hold to bail be defective, the Court will discharge the defendant on common bail, *Hussey v. Baskerville*, 63 *notis*

14. Bail cannot sue on a counter-security, until they are damnified, 78

15. If a *feme covert* be arrested, and her coverture is clear and notorious, she shall be discharged on common bail, but otherwise she shall find special bail, and be put to plead the coverture in abatement, *Anonymous*, 105

16. If the plaintiff has trusted a *feme sole*, or a married woman living separately from her husband, they shall respectively, on being arrested, find special bail, *Wilson v. Campbell*, 105 *notis*

17. One

17. One joint and ſeveral bail-bond for the appearance of *three* defendants, is bad, *Groſvenor v. Soame*, 122

18. An action will not lie againſt a ſheriff for taking inſufficient bail; but if he have not the defendant on the return of the writ, he may be amerced, unleſs he has aſſigned the bail-bond, *Groſvenor v. Soame*, 122

19. If *bail to the ſheriff* become *bail above*, they are not liable to *exceptions* after aſſignment of the bail-bond, *Groſvenor v. Soame*, *ib.*

20. Where a *ca. ſa.* is returnable againſt the principal on a particular day, before which a writ of error is allowed and ſerved, that operates as a *ſuperſedeas* againſt the bail, although the *ca. ſa.* has been four days in the office before the allowance of the writ of error, *Parry v. Campbell*, 130 *notis*

21. In *ſcire facias* againſt bail, if they were ſummoned on the return-day only an hour before the *Court riſes*, the proceedings ſhall be ſet aſide, *Webb v. Harvey*, 130 *notis*

22. For what length of time the Court may require bail on articles of the peace, 132 *notis*

23. Debt lies in the king's bench on a recognizance of bail taken in the common pleas; but it ſhall be diſcharged if the principal be ſurrendered in eight days in full Term after return of proceſs, *Sbuttle v. Wood*, 133

24. In debt on a recognizance againſt bail, if the defendant plead "no *ca-* "*pias*" againſt the principal, and the plaintiff reply "*a capias prout patet per* "*recordum*;" a rejoinder, that "a "writ of error was allowed before the "return of the *capias*," is *a departure* from the plea, *Parkins v. Woolaſton*, 139

25. Form of declaring in debt on a recognizance againſt bail, *Parkins v. Chatterton*, 159

26. If an *appeal of murder* be removed into the king's bench, and the appellee be admitted to bail, he cannot be diſcharged on appearing to his recognizance and producing a releaſe from the proſecutor, but muſt be arraigned upon the record, and then plead the *releaſe*, or *autrefois acquit*, *Culliford's Caſe*, 219

27. Proceedings on a bail-bond ſet aſide, becauſe no *cepi corpus* returned, *Anonymous*, 229

28. The ſtatute 4. & 5. Anne, c. 16. and the modern practice with reſpect to bail-bonds, ſtated, 229 *notis*

29. If a perſon commit a treſpaſs of aſſault, and be arreſted under a ſpecial *ac etiam*, yet his bail may be excuſed, under circumſtances, from juſtifying to the extent of the ſum mentioned in the Judge's warrant, *Cockroft v. Smith*, 230

30. Upon a writ of error and bail put in, the defendant has twenty days to except againſt the bail, which exception ought to be entered in the clerk of the errors book, *Gibbon v. Dacre*, 230

31. Bail may take their principal at any time, even on a *Sunday*, to ſurrender him in their diſcharge, *Anonymous*, 231

32. At what time bail may ſurrender the principal, though notice be not given to the plaintiff, *Anonymous*, 238

33. If a principal be committed to a tipſtaff on a ſurrender at a Judge's chambers, and eſcape, the bail are liable, 239

34. If a defendant, upon *habeas corpus*, remove a cauſe from an inferior court in which there ought to have been *ſpecial bail* below, he ſhall give bail above, but the ſum ſhall be in the diſcretion of the Court, *Bignall v. Devniſh*, 242

35. Bail may detain their principal in *the Compter*, in order to ſurrender him to the proper priſon in diſcharge of their recognizance, even though he be not charged with a debt to THE CROWN, and the attorney-general oppoſes the *habeas corpus*, *French's Caſe*, 247

36. If a man be in cuſtody two Terms without *a declaration*, he ſhall be diſcharged on filing common bail, *Tilſden v. Parſtman*, 264

37. BAIL was formerly only liable when the plaintiff did not recover a *greater*

ſum

ſum than that which was laid in the action; for if he did, the bail was thereby diſcharged from his recognizance: but now, in the KING'S BENCH, bail are liable to the ſum ſworn to and indorſed on the writ in the actions in which they became bail, and any *leſſer ſum*, and alſo to *the coſts* of ſuch action; but in the COMMON PLEAS, the bail-bond being taken in double the ſum indorſed on the writ, they are liable to the extent of the penalty of the bail-bond, *Garibaldo v. Cagnoni*, 266 *notis*

38. A defendant, both in the court of king's bench and common pleas, may be held to ſpecial bail in an action on a judgment for ten pounds for damages and *coſts*, although the original debt was under ten pounds, *Lewis v. Potter*, 268 *notis*

39. If a priſoner for debt be diſcharged under an inſolvent debtors act, and be afterwards taken again for above the ſum mentioned in the act, he muſt find ſpecial bail, *Cragen v. Glover*, 301

40. On a *ſcire facias* againſt bail, if "no *capias* againſt the principal" be pleaded; A REPLICATION ſhewing a *capias* ſued out after the expiration of a year and a day from the giving of the judgment, is good, although no *ſcire facias* appear, *Cholmley v. Veal*, 304, 305

BAILMENT.

1. If *A.* bail the goods of *C.* to *B.* and *C.* bring *detinue* againſt *B.* for them, *B.* may plead the bailment to him by *A.* to be re-delivered to *A.* and ſo being in *A.* as *garniſhee*, to interplead with *C. Rich v. Aldred*, 216

2. If *A.* bail goods to *C.* and afterwards give his whole right in them to *B.* *B.* cannot maintain *detinue* for them againſt *C.* becauſe the *ſpecial property* that *C.* acquires by the *bailment* is not thereby transferred to *B. Rich v. Aldred*, 216

BANKRUPT.

1. In an action by an aſſignee of bankrupt on a ſimple contract, the promiſe muſt be laid in the declaration to have been made to the bankrupt, except there be an expreſs promiſe after aſſignment made to the aſſignee, *Anonymous*, 131

2. If an action of debt be brought upon a judgment, and before plea pleaded the defendant become a bankrupt, the Court will not permit the plaintiff to pay money into court, in order to have ſo much ſtruck out of the declaration, *Anonymous*, 153

BARRISTER.

1. A *barriſter* may be puniſhed in a ſummary way for mal-practices in the courſe of his profeſſion, 137

2. If an *attorney* be made a *barriſter*, yet that will not diſcharge him from being puniſhed for mal-practice as an attorney, *Anonymous*, 137

BASTARD.

1. An order of *filiation* made on the examination of *one juſtice* is bad, although *two juſtices* make the adjudication; for the examination is a judicial act, and both muſt be preſent, *Reg. v. Weſt*, 180

2. The *reputed father* muſt be preſent on a motion to quaſh an *order of filiation*, 180

3. An indictment for conſpiring to charge a man with being the reputed father of a *baſtard child*, need not aver that the perſon charged was not the father, *Reg. v. Beſt*, 184

4. An order of filiation, while unreverſed, is concluſive evidence that the perſon charged is the reputed father, *ib.*

5. An order of baſtardy on a married woman muſt ſhew that the huſband is dead, *Weſtbury v. Coſtham*, 213

BATTERY.

1. To touch another in anger, though in the ſlighteſt degree, and under pretence of paſſing, is, in law, *a battery*, *Cole v. Turner*, 149

2. Spitting in another's face is a battery, *Reg. v. Cogſwell*, 172

BILLS OF EXCHANGE.

A note of hand, after twenty years, and no demand of, or proceedings on it, ſhall be preſumed to have been paid, *Anonymous*, 22

Formerly *promiſſory notes* were not negotiable within the cuſtom of merchants, *Buller v. Crips*, 30

But now by 3. & 4. Anne, c. 9. they are put on the ſame footing as *inland bills of exchange*, 30 *notis*

In an action againſt *the drawer* of an inland bill of exchange, it is not neceſſary to ſet forth *a proteſt*; for the ſtatute 9. & 10. Will. 3. c. 17. does not deſtroy the action for want of a proteſt, but only prevents the party from recovering *intereſt* and *coſts*; and therefore if the drawer ſuſtain damages for want of a proteſt, they ſhall be borne by the holder, *Brough v. Perkins*, 81

5. Intereſt on a bill of exchange commences from demand made; and therefore if no demand be made until action brought, the defendant may plead tender and refuſal, and *encore pres*, *Anonymous*, 138

6. By 3. & 4. Anne, c. 9. ſ. 7. if any perſon receive a bill of exchange in ſatisfaction of a former debt, it ſhall be deemed complete payment, if he do not take due courſe to get it paid, 148 *notis*

7. The due courſe is to demand payment at the time the bill becomes due, or to give notice of non-payment within a reaſonable time, 148. *notis*

8. What ſhall be conſidered a reaſonable time is a queſtion of *law*, and not of *fact*, 148. *notis*

BONA NOTABILIA.

A judgment at law is *bona notabilia* in the place where it is given; and therefore on a judgment recovered at *Weſtminſter*, adminiſtration cannot be granted by the archdeacon of *Dorſet*, 134

BOND.

1. By 4. & 5. Anne, c. 16. in any action on a bond for payment of money with a penalty, on the defendant's bringing into court all the principal, intereſt, and coſts, the Court may diſcharge him from the action, *Anonymous*, 11 *notis*

2. But a motion cannot be made to pay principal, intereſt, and coſts, on a bond, into court, until bail is filed in the action; for the ſtatute ſays, it ſhall be done "at any time *pending* the action," and until bail is filed, the parties are not in court, *Anonymous*, 11

3. If a bond be of twenty years ſtanding, and no demand proved thereon, or good cauſe ſhewn for ſo long a forbearance, it ſhall, upon a *ſcire ad diem*, be preſumed to have been paid, *Anonymous*, 22

4. A bond, conditioned for the obligor's ſubmiſſion to the church, is good, *Denham v. Ladler*, 72

5. If a feoffment be pleaded in ſatisfaction of a bond, the acceptance of it muſt be laid in the county where the feoffment was made, *William v. Farrow*, 82

6. In debt on bond, the defendant, on bringing *principal*, *intereſt*, and *coſts* into court, ſhall be relieved againſt the penalty, *Ireland's Caſe*, 101

7. By 4. & 5. Anne, c. 16. ſuch principal, intereſt, and coſts, ſhall be taken in full ſatisfaction of ſuch bond, and the defendant diſcharged of and from the ſame, 102 *notis*

8. But in debt on bond with condition to account for money to be received, the Court will not ſtay proceedings on payment of the penalty into court; for in ſuch caſe damages may be recovered for more than the penalty, *Lord Lonſdale v. Church*, 102. *notis*

9. Precedent of proceeding by bill againſt an officer of the court of king's bench in an action of debt on bond, *Lee v. Mills*, 106

10. *One* joint and ſeveral bond for the appearance of three defendants is bad, *Groſvenor v. Soame*, 122

11. In what caſe comparition of hands is good evidence to prove the atteſtation of a bond, *Oſbourne v. Hoſier*, 167

12. In

12. In debt on a ſingle bond, the jury may give the amount of the intereſt due in damages, *Oſbourn v. Hoſier*, 167

13. In what caſe intereſt ſhall be allowed on a bond, 184

14. If a ſon borrow money for the uſe of his mother, and give a bond to pay it *on demand*, and the mother do not pay it; THE OBLIGEE may declare on this bond againſt THE OBLIGOR, without ſtating any *ſpecial requeſt* to the mother to pay the money, *Harwood v. Tuberville*, 200

15. In debt on bond, if the defendant plead that it was delivered as an *eſcrow* upon a condition not performed, and ſo *not his deed*, a concluſion to *the country* is cured by replying a different *condition*, and traverſing the condition ſtated in the plea, *Buſhel v. Paſmore*, 217

16. A bond given to ſave a gaoler harmleſs againſt *paſt eſcapes* is good, but not againſt *future eſcapes*, *Fox v. Tilly*, 225

17. If *A.* make a bond in the name of *B.* and is ſued by the name of *B.* he may plead a *miſnomer*, *Linch v. Hooke*, 225

18. If a maſter give a bond to make his apprentice free of the city at the end of ſeven years, *if requeſted*, the defendant may plead, to an action of debt on this bond, "that at the end of ſeven "years, or after, he was not requeſted, "&c.;" for he was not bound to do it, except upon requeſt made at the time appointed for performance, *Fitz-Hugh v. Dennington*, 227. 259

19. A declaration in debt on bond, conditioned to pay "to *A.* his attorney, or "aſſigns," is maintained by evidence of a bond "to pay to the attorney of "*A.* or his aſſigns," *Robert v. Harnage*, 228

20. If a bond bear date at any place *abroad*, that place muſt be ſtated in the declaration, with a *viz.* at ſuch a place in *England*, *Robert v. Harnage*, *ib.*

21. In debt on bond, if the defendant, on *oyer*, diſcover that a material eraſure has been made in the condition, and plead *non eſt factum*, and the plaintiff, perceiving the eraſure to be detected, countermands notice of trial, *per rot.* Court will not impound the deed, *Selby v. Green*, 273

22. If a perſon hold an *auditor's* office for life, and depute another to exerciſe the ſaid office during his good behaviour, A BOND given by ſuch deputy to pay his principal yearly during the ſaid deputation 200l. and that in conſideration thereof the deputy ſhall have all the rents and profits of the ſaid office to his own uſe, is void by the ſtatute 5. & 6. Edw. 6. c. 16. for it is a bond to pay a certain ſum at all events. *Godolphin v. Tudor*, 274

23. In debt by an adminiſtrator againſt an heir on the bond of his anceſtor, he need not ſhew how the defendant is heir, *Denham v. Stevenſon*, 241

24. An adminiſtrator, in an action of debt on a bond againſt an heir, may declare generally, that adminiſtration was in *due manner* committed to him by ſuch *a peculiar*, without ſhewing the right of the peculiar to grant adminiſtration, *Denham v. Stevenſon*, 242

25. In debt on bond for performance of an award, it is not neceſſary to ſtate the *date of the award*; for if it be alledged to have been made on a day which is within the time of the ſubmiſſion, it is ſufficient, *Arnote v. Breame*, 244

26. A declaration in debt on bond, ſtating, that the defendant was bound by the *name* of *John Villars*, *Viſcount Purbeck*, and *Earl of Buckingham*, is good; although the better way is to ſtate the *title* under an *alias dictus*, *Villars v. Cary*, 303

27. A declaration in debt on bond, ſtating, that on ſuch a day the defendant became indebted to the plaintiff *per ſcriptum ſuum obligatorium*, is ſufficient, without ſhewing the *date* of the bond, or ſaying, that it *was ſealed and delivered*, *Woodcock v. Morgan*, 306

BILLINGSGATE DOCK.

Billingſgate Dock, though a common dock, is not free for all ſhips, but fitted

ted only to receive ſmall veſſels; and therefore to bring a large ſhip of 300 tons burthen into the dock is a public nuiſance, *Reg. v. Leech*, 145

BOROUGH.

A *burgeſs* and a *citizen* taken as electors of members of parliament, are both upon the ſame foundation, *Aſhby v. White*, 52

There are two ſorts of *boroughs*; the firſt, where the electors give their votes in reſpect of their burgeſſes; the ſecond, where they give them as members of a corporation, *Aſhby v. White*, *ib.*

3. An indictment on the 5. Eliz. c. 4. for uſing a trade without having ſerved as an apprentice to it will lie at a borough ſeſſion, *Reg. v. Franklin*, 220

BOROUGH ENGLISH.

1. If a perſon have five ſons, and the youngeſt ſon die in the life-time of his father, leaving iſſue *a daughter*, and the father afterwards purchaſe, and become ſeiſed of *copyhold lands* in the nature of *borough Engliſh*, the daughter of the fifth ſon ſhall, on the death of her grandfather, inherit theſe lands *jure repræſentationis*, and not the fourth ſurviving ſon; for by the cuſtom of *borough Engliſh*, the youngeſt ſon and his *repreſentatives* are as much heirs to the *borough Engliſh* lands as an eldeſt ſon and his repreſentatives are heirs to lands deſcendible as at common law, *Clement v. Scudamore*, 120

2. But where there is a cuſtom within a manor that lands ſhall deſcend to the *eldeſt ſiſter*, where there is neither a ſon nor a daughter, the cuſtom does not extend to an *eldeſt niece*, but the lands muſt deſcend according to the rules of the common law, in default of ſuch ſon, daughter, or niece, *Goodwin v. Spray*, 122 *notis*

BRIDGES.

1. On an information againſt *a county* for not repairing a bridge, THE ATTORNEY GENERAL may try the cauſe in any adjacent county, and award the *venire* either to *the body* of that county or to *the vicinity* of any particular place therein, *Reg. v. Wilts*, 191

2. An indictment for not repairing "a "*common bridge* ſituated in a certain "common *foot-path*," is good, without ſtating that it was in the *king's highway*, *Reg. v. Saintiff*, 255

3. The ſeſſions have no power by 22. Hen. 8. c. 5. with reſpect to *private bridges* not common in the *highways*, unleſs they are *public nuiſances*, and then they have juriſdiction, *Reg. v. Saintiff*, 256

4. The inhabitants of a county cannot of their own authority change a bridge from one place to another: it muſt be by act of parliament, *Reg. v. Wilts*, 307

5. A public bridge muſt, of common right, be repaired by the county; but by tenure, preſcription, &c. the burthen of repair may be on a particular perſon, *Reg. v. Wilts*, *ib.*

6. If a private perſon build a private bridge, which afterwards becomes of public convenience, the whole county is bound to repair it, *Reg. v. Wilts*, *ib.*

BYE-LAW.

1. A *bye-law* creating a penalty for not weighing goods by foreigners at the ancient beam of the city of *London*, is good, *Cuddon v. Provoſt*, 123

2. A bye-law of the city of *London* inflicting a penalty on any perſon who ſhall employ *a porter* not free of *the Porter's Company*, is void; but a bye-law that none but a *freeman* ſhall do porterage work, is good, *Cuddon v. Eſtwick*, 123

3. A bye-law by the mayor and common-council of *Exeter*, that no butcher or other perſon ſhall, within the walls of the ſaid city, ſlaughter any beaſt, under pain of forfeiting certain penalties therein ſpecified, is good, not being in reſtraint of trade, but only a regulation of it, *Pierce v. Bartram*, 124

4. The

4. The validity of a bye-law cannot be tried upon the return to a *habeas corpus*, except in the case of the *City of London*, *Ballard v. Bennett*, 178 *notis*

C.

CASE,

ACTIONS ON THE.

1. An action on the case will lie for saying, "You stole my Boxwood, and I "will prove it," *Baker v. Pierce*, 23

2. A person who has a right to vote for the election of members to serve in parliament may maintain an action against the sheriff or other officer who takes the poll for refusing to admit his vote, although the right of such elector to vote was never determined in parliament, and although the candidate for whom he tendered his vote was returned *duly elected* by the officer who refused the vote, *Ashby v. White*, 46

3. An action on the case lies for making a *false return* to a writ of *certiorari*, *Cooper's Case*, 90

4. A declaration in an action on the case for saying, "There goes *A.* who is one "of those that stole *B.*'s deer," must aver that a deer was stolen from *B.* and that the deer was tame, *Ogden v. Turner*, 104

5. Precedent of a declaration in an action on the case for stopping ancient lights, *Roswell v. Prior*, 116

6. An action on the case will not lie for saying to a mayor, "You, Mr. May- "or, I don't care a fart for you. "You, Mr. Mayor, are a rogue and "a rascal," *Reg. v. Langley*, 125

7. An action on the case will not lie for falsely indicting another for a conspiracy until the prosecution be determined, *Reg. v. Best*, 138

8. An action will not lie in the common law courts for calling a woman "a "whore," *Graves v. Blanchett*, 148

9. An action on the case for not repairing fences, whereby another party is damnified, can only be maintained against *the occupier*, and not against the owner of the fee who is not in possession, *Cheetham v. Hampson*, 198

10. An action on the case will not lie for saying of the chancellor of a diocese, "There goes your rare chan- "cellor, to suborn witnesses to swear "against the parson," *Walmsley v. Russell*, 200

11. If a person deliver his horse to a *stable keeper*, to be by him *safely kept* at a reasonable rate, and to be safely delivered, and the horse, by the negligence of the stable-keeper, be taken out of the stable, and so immoderately rode as to be spoiled, an action lies for his neglect in not safely keeping the horse according to the contract, *Stanyon v. Davis*, 225

12. An action on the case lies against the clerk of the errors for certifying a wrong record, *Anonymous*, 245

13. If *A.* is about to hire a horse from *B.* and *C.* in order to encourage *B.* to lend the horse say, "*Let A. have the* "*horse, and I undertake that he shall* "*re deliver it to you safely*," an action on the case will not lie against either *B.* or *C.* for the non-delivery of the horse, because no credit was given to *B.* and it was a collateral undertaking on the part of *C.* and not being in writing is void by the statute 29. Car. 2. c. 3. *Bucknire v. Darnel*, 249

14. In an action on the case by a lessee for years against the owner of the adjoining house, for not repairing a party-wall, by which the plaintiff's house was damaged, it is not necessary to state that he was bound by *prescription* to repair the wall; it is sufficient to declare that he was *possessed* of a messuage for a certain number of years, and that the defendant ought to repair the wall, &c. *Tenant v. Goldwin*, 312

CAPE.

1. In a real action, if the tenant make default on the original, the demandant shall have a *grand cape*; and if he make default after appearance, a *petit cape*, *Staple v. Heydon*, 4

2. Where-

2. Wherever in a real action the default is saveable, so that a *grand* or *petit cape* shall go, there in a personal action a default is not peremptory, *Staple v. Heydon*, 6

CERTAINTY.

1. Pleas in bar need only be certain to a common intent, *Claxton v. Bafly*, 58

2. An indictment for forging A COCKET for *five packs of linen cloth* is sufficiently certain, *Reg. v. Browne*, 87

CERTIORARI.

1. If a defendant be convicted at the seſſions on *an indictment* for a misdemeanor, and a *capias pro fine* be entered againſt him, he ſhall not have a *certiorari* to remove the record; and if one hath iſſued, the Court may grant a *procedendo*; but on *conviction*, where a writ of error does not lie, the Court will in general grant a *certiorari* after verdict, and before judgment, *Reg. v. Bethel*, 17

2. A *certiorari* lies to remove a conviction in certain caſes, although the party may bring a writ of error; as to plead a pardon, or for other ſpecial reaſons, *Reg. v. Bethel*, 17

3. A *certiorari* will not lie to remove an indictment for a conſpiracy from the ſeſſions after conviction and before judgment, 17 *notis*

4. A *certiorari* will not lie on the part of a defendant after he has appealed to the ſeſſions, pending the appeal, 17 *notis*

5. A *certiorari* to remove an indictment is no *ſuperſedeas* unleſs bail be given purſuant to the ſtatute, *Reg. v. Bethel*, 33

6. If an order on which appeal lies be removed by *certiorari* before appeal, it ought not to be filed until the Court is informed of the matter, and then they will grant a *procedendo* notwithſtanding the *certiorari*, *Anonymous*, 40

7. The juſtices names need not be ſubſcribed to the return of a *certiorari*; if it begin, "The anſwer of the juſtices, &c." it is ſufficient; but it muſt ſtate that they are juſtices of the peace, *Anonymous*, 43

8. A *certiorari* to remove an indictment is no *ſuperſedeas*, unleſs recognizance be given purſuant to 6. Will. & Mary, c. 11. 43

9. If the cauſe ſuggeſted to obtain a *certiorari* appear to be falſe, a *procedendo* ſhall go although the return be filed, 43 *notis*

10. But the writ muſt be firſt ſuperſeded *quia improvidè emanavit*, and the return taken off the file, 43

11. A *procedendo* cannot be moved for while the return of a *certiorari* continues on the file, 43 *notis*

12. A *certiorari* to remove an indictment for a miſdemeanor from the quarter ſeſſions taken out before, but not ſerved till after conviction, ſhall be quaſhed, *Reg. v. Dixon*, 62

13. A *certiorari* will not lie to remove an indictment from ſeſſions after verdict and before judgment, *Reg. v. Nichols*, 62 *notis*

14. A *certiorari* does not lie to remove proceedings under a *foreign attachment* from the mayor's court of London, *Smith v. Mayor of London*, 78

15. A *certiorari* to remove a conviction iſſued after a warrant of diſtreſs, does not ſuperſede the execution, *Morley v. Stacker*, 83

16. The Court will not hear *affidavits* againſt the *legality* of the return of a *certiorari*, unleſs to prove that the return was *corruptly* made; but if the return be *falſe*, the party may have his action on the caſe, *Cooper's Caſe*, 90

17. If *want of an original* be aſſigned for error, and *a releaſe* be pleaded, yet a *certiorari* to inform the Court whether there was any *original* or not, may be amended in the ſame manner as if *in nullo eſt erratum* had been pleaded; but the party cannot demand it of right, *Carleton v. Mortagh*, 113. 206

18. On

18. On a writ of error on a judgment from *Wales*, a *certiorari* to inform the Court may iſſue, although the record has been before amended, *Lewis v. Jones*, 138

19. If the want of an *original* be aſſigned for error, and the defendant appears and alledges *diminution*, and upon a *certiorari* granted, a *variant original* be certified, yet he may, at the *day given*, ſuggeſt a *right original* of another Term, and have another writ of *certiorari* thereon; but there muſt be previous *notice* to the plaintiff of this ſuggeſtion, and the new *certiorari* muſt be filed in the office, or the proceedings will be irregular, *Barnaby v. Sanderſon*, 174

20. A *certiorari* lies upon the conventicle act, *Reg. v. Morly*, 229

21. If a defendant, upon error aſſigned, will not come in and plead, the plaintiff muſt have a *ſcire facias* to hear errors, and a *certiorari* to certify the want of an original, *Davenant v. Rafter*, 236

22. The proceſs on indictments originally commenced in the court of king's bench muſt be returnable on a *day certain*, but if removed there by *certiorari*, on a common day, *Reg. v. Tutchin*, 268

CHANCERY.

The court of chancery will not grant an injunction to the proceedings of the court of king's bench againſt an attorney for a contempt in having delivered a fictitious declaration in ejectment, and thereby procured a fraudulent poſſeſſion of the premiſes, *Holderſtaffe v. Saunders*, 16

CHEAT.

1. If a perſon, intending to defraud another, procure him to lay money upon a foot race, and then prevail on the party to run booty, he may be indicted for the cheat, *Reg. v. Orbel*, 42

2. If *A.* cheat *B.* of goods and ſell them to *C.* and *B.* after notice that *C.* claims property therein replevy them, *C.* may bring *treſpaſs* for the taking, *Leonard v. Stacey*, 69

3. Deceitfully receiving money from one man to the uſe of another on a pretended order for ſuch purpoſe is not indictable at common law, *Anonymous*, 105

4. But by 33. Hen. 8. c. 1. to obtain money or goods by means of a falſe *privy token* or counterfeit letter, is an indictable offence, 105 *notis*

5. And by 30. Geo. 2. c. 24. to obtain money or goods by a *falſe pretence* with intent to cheat any perſon of them, is alſo an indictable offence, 105 *notis*

6. If a man, by giving a *falſe account* of himſelf, prevail on a trader to ſell him goods upon credit, the property of the goods continues in the *vendor*, although the *vendee* by this means obtains poſſeſſion of them, *Anonymous*, 114

7. But if goods are obtained by *falſe pretences* and pawned without notice of the fraud, and on the offender being convicted of the cheat, the original owner obtain the goods, the pawnbroker may maintain *trover* againſt him to recover them back, 114 *notis*

8. If two men under the falſe pretence of being, the one *a broker*, the other *a wine merchant*, exchange a liquor which they affirm to be *New Liſbon wine*, with *a hatter* for *hats*, whereas in truth the liquor was, to their own knowledge, only a mixture of ſtale *beer and vinegar*, it is an indictable offence, *Maccarty's Caſe*, 302

9. An indictment that *A.* being a *common cheat*, &c. is too general, *Reg. v. Hannen*, 311

10. A cheat of a private nature effected by a *naked lie*, is not indictable, 311

CHURCH.

1. A *mandamus* lies to the ſpiritual court to ſwear in churchwardens, *Reg. v. Grey*, 89

The eccleſiaſtical court may proceed on the ſtatute 1. Eliz. c. 2. ſ. 14. againſt a man for not going to his pariſh church on *Sunday*, and for not receiving the ſacrament at *Eaſter*, *Britton v. Standiſh*, 188

3. A *donative* may be with the cure of ſouls, as is the chapel in the Tower of *London*, *Jacob v. Dallo*, 231

4. There is a kind of church that is neither *preſentative* nor *donative*, but *ſtipendiary*, and yet has the cure of ſouls, *Jacob v. Dallo*, *ib.*

5. Anciently there were no *pews* in churches, but only *forms*, *ib.*

6. A ſuggeſtion to prohibit the ſpiritual court from proceeding on a right to a *pew*, muſt ſhew whether the church was preſentative or donative, *Jacob v. Dallo*, 230

CLERGYMAN.

A clergyman is exempted from ſerving the office of overſeer of the poor, *Anonymous*, 140

CLERK.

1. A *mandamus* will not lie to reſtore a perſon to the office of clerk of a company in a corporation, *White's Caſe*, 18

2. In what caſes the ſeſſions may inquire into the miſconduct of *a clerk of the peace*, *Reg. v. Baines*, 192

3. A *pariſh clerk* is a temporal officer, and therefore cannot ſue for his fees in the ſpiritual court, *Parker v. Clerk*, 253

CLERK OF THE PEACE.

1. The ſeſſions, on articles exhibited purſuant to 1. Will. and Mary, c. 21. ſ. 6. may enquire into exceſſive fees taken by a clerk of the peace, *Reg. v. Baines*, 192

2. Other juſtices than thoſe who conſtitute the ſeſſions, where articles are exhibited againſt a clerk of the peace, may enquire into the truth of the charges, and amove him, *Reg. v. Baines*, 192

3. In articles exhibited againſt a *clerk of the peace*, it muſt be alledged that he was clerk of the peace at the time when the act complained of was done, *Reg. v. Baines*, 192

4. It is ſufficient to alledge in the articles, where the complaint is for extortion, that he took more than his juſt fees, *ib.*

5. But it muſt ſhew that the fees ſo unjuſtly taken were taken by colour of his office, *Reg. v. Baines*, 193

6. The ſame certainty is required in ſtating the charge againſt a clerk of the peace, in the articles exhibited at the ſeſſions, as is required in an indictment, *Reg. v. Baines*, *ib.*

7. If a clerk of the peace has committed a miſdemeanor, and, to prevent a forfeiture, ſurrenders his office to the *cuſtos rotulorum*, and afterwards takes a new grant of the office, this ſhall not purge the forfeiture, *Reg. v. Baines*, *ib.*

8. If a clerk of the peace be convicted of a miſdemeanor in the execution of his office, and diſcharged, the *cuſtos* muſt nominate another perſon within a convenient time, *Reg. v. Baines*, *ib.*

COLLECTOR.

A commiſſioner or collector of taxes cannot compel the inhabitants to come before him out of the county, *Anonymous*, 145

COMMON.

An avowry ſetting forth a preſcription of common for cattle *levant et couchant* upon ſuch a cottage, is good; for a cottage ſhall be intended to have ſufficient land annexed to it, in which the commonable cattle may be *levant et couchant*, *Emerton v. Selby*, 115

COMPOSITION.

How the *compoſition act* ought to be pleaded, 58. 156

CONSPIRACY.

1. Preſentment of an indictment for falſely conſpiring to charge another with being the father of a baſtard child, *Reg. v. Beſt*, 137. 185

2. An

2. An *indictment* will lie for falſely indicting another for a conſpiracy before the defendant is acquitted, but not an *action on the caſe*, *Reg. v. Beſt*, 138

3. In an action on the caſe for a conſpiracy, the fact of *conſpiracy* need not be ſtated in the declaration, but may be collected by the jury from the circumſtances of the facts diſcloſed in evidence, *Muriel v. Tracy*, 169

4. In an action of conſpiracy, one of the defendants may be found guilty, and the reſt acquitted, 170

5. An illegal conſpiracy is indictable, though nothing be done in purſuance of it, *Reg. v. Beſt*, 186

CONSTABLES.

1. A conſtable is juſtified in acting under a warrant from a juſtice on a conviction on a penal ſtatute, although the conviction is erroneous, *Reg. v. Dyer*, 42

2. No man who keeps a public houſe ought to be a conſtable, *Anonymous*, *ib.*

3. If a conſtable levy goods under a warrant of diſtreſs and ſells them, but, upon an idea that he had no right to ſell, undoes the ſale and reſtores the money and goods to their reſpective owners, he ſhall not be chargeable for the amount, if he acted *bona fide*, and to the beſt of his knowledge, and there was a real doubt in law whether he had or had not a right to ſell, *Morley v. Stacker*, 83

4. An eſcape warrant on the ſtatute 1. Ann. c. 6. though it may be granted to *private perſons*, muſt be executed by *a conſtable*, or other legal officer, *Rich v. Doughty*, 154

CONTEMPT.

1. If recently after a perſon has been put into poſſeſſion under an *habere facias poſſeſſionem*, he be forcibly diſpoſſeſſed, it is a contempt of the proceſs of the law, for which the Court will grant an attachment, *Kingſdale v. Mann*, 27

2. It is a contempt of Court to ſpeak contemptuouſly on a copy of a writ being ſhewn to a perſon, although he did not know the contents of it, or out of what court it had iſſued, *Reg. v. Croſſe*, 44

3. It is a contempt to charge a priſoner in execution for *a fine*, with a *civil action*, without leave of the Court, *Anonymous*, 88

4. It is a contempt knowingly to procure the arreſt of a perſon going to court to plead to an indictment, *Garibaldo v. Cagnoni*, 90

5. To hinder a bailiff from arreſting a man is a contempt of Court, *Powell v. Ball*, 210

6. A *county* may be in contempt for diſobeying an order of the court of king's bench, *Reg. v. Wells*, 307

7. Filling up a writ after it is ſealed is a contempt, *Anonymous*, 310

CONTINUANCE.

1. Parties to a ſuit were anciently demandable at every *continuance* day, *Staple v. Heydon*, 5

2. If there are two defendants, and one demurs, and the other pleads to iſſue, and a *venire facias* goes to try the iſſue and enquire of contingent damages before the day of *niſi prius*, and after the laſt continuance the plaintiff give a releaſe to the defendant who demurred; *Qu.* If this defendant can plead the releaſe *puis darrein continuance*, 9

3. Treſpaſs for breaking the plaintiff's cloſe and hunting and killing his rabbits may be laid with a *continuando*, *Monckton v. Atley*, 38

4. If the plaintiff die between the day of *niſi prius* and the day *in bank*, the fact muſt be pleaded *puis darrein continuance*, *Fox v. Tilly*, 225

CONVICTION.

1. A conviction for killing game, ſtating, that the defendant *being a diſſolute perſon*, hunted and killed ſo many hares, is

is not ſufficient, for it muſt ſhew that he was not qualified, *Reg. v. George*, 40

2. A conviction on a penal ſtatute muſt ſhew that the defendant was *ſummoned*; and therefore if a conviction ſtate that "the defendant was ſummoned, "and did, by virtue thereof, appear "on *Tueſday* the 17th of *April*," and it appears by THE ALMANACK, of which the Court is bound to take notice, that the 17th of *April* was on a *Friday*, the conviction ſhall be quaſhed; for the time of the ſummons being *impoſſible*, it is the ſame as if there had been no ſummons, *Reg. v. Dyer*, 41

COPYHOLD.

1. In an action on the caſe for diſturbance of common claimed in right of lands, parcel of ſuch a manor, it muſt be ſtated not only that the lands were by cuſtom held at *the will of the lord*, but alſo that they were *demiſed and demiſable* by him to hold of him, &c. *Crowder v. Oldfield*, 20

2. But if a declaration ſtate, that the plaintiff was *ſeiſed* of lands parcel of ſuch a manor, and that he held them by copy of court roll as a cuſtomary tenant according to *the cuſtom* of the ſaid manor, and that he had in reſpect thereof, a right of common by cuſtom on ſuch a part of the manor; the omiſſion of ſtating that the lands were held at the *will of the lord* is cured by *a verdict*; for as they are alledged to be *parcel of the manor*, they ſhall then be intended to be copyhold, *Crowder v. Oldfield*, 19

3. If a copyholder of one manor has common in the waſtes of another manor, he muſt preſcribe in the name of his lord, and ſay that the lord of that manor whereof he is a copyholder, uſed time out of mind to have common for him and his copyholders, *Crowder v. Oldfield*, 20

4. If the cuſtom of a manor be, that the lord may grant copyhold eſtates "to "three perſons, *habendum* to them ſucceſſively as they ſhall be named and "not otherwiſe," A SURRENDER to *A.* for his own life, and for the lives of *B.* and *C.* is warranted by the cuſtom, *Smartle v. Penhallow*, 63

5. An inquiſition of forcible entry on a copyhold eſtate, alledging that the party was ſeiſed of a cuſtomary eſtate in fee *at the will of the lord*, without ſaying that it was *demiſed* and *demiſable* at the will of the lord, is bad, *Cowper's Caſe*, 90

6. If a perſon have five ſons, and the youngeſt ſon die in the life-time of his father, leaving iſſue *a daughter*, and the father afterwards purchaſe and become ſeiſed of *copyhold lands* in the nature of *Borough Engliſh*, the daughter of the fifth ſon ſhall, on the death of her grandfather, inherit thoſe lands *jure repræſentationis*, and not the fourth ſurviving ſon; for, by the cuſtom of *Borough Engliſh*, the youngeſt ſon and his *repreſentatives* are as much heirs to the *Borough Engliſh* lands as an eldeſt ſon and his repreſentatives are heirs to land deſcendible at the common law, *Clement v. Studamore*, 120

CORPORATIONS.

1. A corporation cannot make a bye-law inflicting a penalty on any perſon who ſhall employ *a porter* not free of the porters company; but they may make a bye-law, that none but a freeman ſhall do porterage work, *Cudden v. Eſtwick*, 123

2. So a corporation may make a bye-law inflicting a penalty, that foreigners when they ſell goods ſhall weigh them at the city beam, *Cudden v. Provoſt*, 123

3. A private corporation or company can only make bye-laws to bind their own members, and touching matters that concern the regulation of the trade or other affairs of the company; but the corporations of great cities and towns may make bye-laws for the better ordering and managing ſuch town, *Cudden v. Eſtwick*, 124

4. If a power be granted by charter to a corporation exerciſing a particular trade

trade in a particular place, to make bye-laws for the government of all perſons exerciſing that trade in that place, the corporation is enabled to make bye-laws binding as well on perſons exerciſing that trade who are *not members* of the corporation, as on thoſe who are, *Butchers Company v. Morey*, 124 *notis*

5. A corporation aggregate cannot be declared againſt as *in cuſtodiâ mareſchalli*, *Anonymous*, 183

6. A preſcription "that time out of "mind ſuch A CORPORATION did re- "pair the *aiſle* of a church, *ratione cu- "jus* the mayor and aldermen ſat "there," is well pleaded, *Jacob v. Dalle*, 231

CORONER.

If there be two coroners, and one of them, who is inſolvent, ſuffer an eſcape, yet the other ſhall not be charged, *Anonymous*, 38

COSTS.

1. Coſts are not allowed upon *a repleader*; but upon the amendment of a plea in paper, the party is intitled to coſts, *Staple v. Heydon*, 3

2. In debt upon bond, the plaintiff ſhall have whatever coſts he has been in anywiſe put to, *Burridge v. Forteſcue*, 60

3. A defendant ſhall not have coſts upon a judgment in his favour on a demurrer to a plea in abatement, *Garden v. Exon*, 88

4. If a wife be made executrix, and the huſband and wife bring an action as executor for money had and received to their uſe in right of the wife, yet they ſhall pay coſts on being nonſuited; for the receipt being after the death of the teſtator, the cauſe of action aroſe in their own time, and therefore it was not neceſſary to waive the wife's execution, *Jenkins v. Plumbe*, 92. 181

5. In *trover* for goods, the firſt count ſtated the trover and converſion in the time of the teſtator; the ſecond count ſtated the trover in the time of the teſtator and the converſion afterwards; and the third count was for a trover and converſion after the death of the teſtator; the plaintiffs were nonſuited, but the only evidence at the trial was applicable to the firſt count; and the Court held that the plaintiffs in this caſe were not liable to coſts, *Cockerell v. Moody*, 92 *notis*

6. If a bill be filed againſt an attorney in Vacation, other than to avoid the ſtatute of Limitations, the plaintiff will not be allowed his coſts, if the action be ſettled before the enſuing Term, 106 *notis*

7. A judgment being arreſted in *ſcire facias* will not intitle the defendant to coſts under the ſtatute 8. and 9. Will. 3. c. 11. *Adams v. Savage*, 137

8. If a defendant has appeared to, or pleaded in abatement of a *ſcire facias*, he ſhall have no coſts, although the writ be quaſhed on the motion of the plaintiff; but if there be no appearance entered or plea pleaded, the plaintiff, in ſuch caſe, ſhall pay coſts, *Pocklington v. Peck*, 137 *notis*

9. The ſtatute 8. and 9. Will. 3. c. 11. only excludes accidental treſpaſſes from full coſts, *Dove v. Smith*, 153

10. In what caſes arbitrators may award coſts, *Winton v. Garlick*, 195

11. In ejectment, the attorney is liable to coſts where the plaintiff is nominal, *Anonymous*, 309

COVENANT.

1. In covenant for quiet enjoyment, the defendant may plead, that he entered "to diſtrain, *abſque hoc* that ſhe ouſted him of the premiſes," without ſaying "*or any part thereof*," *White v. Bodinam*, 150

2. If an action of covenant be brought by an apprentice againſt his maſter, the defendant cannot, without firſt praying *oyer* of the indenture, plead that the covenants therein are performed, *Foxen v. Moſely*, 155

3. In

3. In an action of debt on bond for performance of covenants, the defendant in pleading "covenants performed" muſt ſhew the indenture from the counterpart, *Cook v. Remington*, 237

4. Covenant lies againſt huſband and wife upon a demiſe to her *dum ſola*, &c. 239

COUNTY.

1. The whole county is of common right bound to repair bridges and highways, *Reg. v. Wells*, 307

2. A county may be in contempt for diſobeying an order of the court of king's bench, 307

See INDICTMENT, HIGHWAY, BRIDGES, ORDER, ATTACHMENT, CONTEMPT.

COUNSELLOR.

1. A *counſellor at law* may commit *extortion* in his profeſſion; and, being a kind of miniſter of juſtice, may, as ſuch, be puniſhed for miſbehaviour, *Anonymous*, 137

2. If an *attorney* be made a *counſel*, yet that will not diſcharge him from being an attorney, 137

COURTS.

1. If a declaration in an inferior court alledge it to be a court *ſecundam legem mercatoriam*, without ſhewing it *curia ſtapulæ*, it ſhall be intended a common inferior court, *Evans v. Roberts*, 61

2. A writ of error directed to the judge of an inferior court to remove a record *coram nobis*, without naming him, is good, although the record was before his predeceſſor, *Evans v. Roberts*, *ib.*

3. A juſtification in treſpaſs, by virtue of proceſs from an inferior court, ſtating, that the court was held under *letters patent*, and by *cuſtom*, is repugnant, *Brigs v. Collingſon*, 70

4. *Quære*, In an action for an eſcape from cuſtody under proceſs of an inferior court, whether it be neceſſary to ſtate in the declaration, by what authority the court was held, *Michelſon v. Cawſey*, 72

5. *Quære*, Whether the court of commiſſioners of the *board of green cloth* can commit "to the porter of the verge," *Elderton's Caſe*, 73

6. Courts muſt, *ex officio*, take notice of the days on which writs are made returnable, *Brough v. Perkins*, 81

7. An inferior court cannot entertain ſeveral actions for the ſame cauſe, in order to obtain juriſdiction, *Catchmade's Caſe*, 91

8. A court, whether ſuperior or inferior, cannot be ouſted of its juriſdiction by plea, until ſuch plea be verified on oath, and tendered in perſon during the ſitting of the court, *Sparks v. Wood*, 146

9. The eccleſiaſtical courts have juriſdiction in all matrimonial cauſes, *Collins v. Jeſſot*, 156

10. The eccleſiaſtical court may proceed on the ſtatute 1. Eliz. c. 2. ſ. 14. againſt a man, for not going to his pariſh-church on a *Sunday*, and for not receiving the ſacrament at *Eaſter*, *Britton v. Standiſh*, 188

11. A ſpiritual perſon may ſue in the eccleſiaſtical court for *a penſion*, though not originally granted or confirmed by the ordinary, *Parker v. Clerk*, 253

CUSTOM.

1. *Quære*, Whether, on a *cuſtom* of a corporation, that no perſon who has not ſerved ſeven years to a trade, or been made free of ſome guild therein, a perſon can be ſued for exerciſing ſuch trade within the corporation, *Mayor of Wincheſter v. Wilks*, 21

2. A cuſtom may be tried in a feigned action, 90

3. The cuſtom of *Borough Engliſh* that the lands ſhall deſcend to the younger child of the inheritor, ſtands in the place of the mode of deſcent, with reſpect to lands, at common law, *Clement v. Scudamore*, 121

4. But a cuſtom within a manor that lands ſhall deſcend to the *eldeſt ſiſter*, where there is neither a ſon nor a

daughter, does not extend to an *eldeſt niece*, but the lands muſt deſcend according to the rules of the common law, in default of ſuch ſon, daughter, and niece, *Goodwin v. Spray*, 122 *notis*

5. In what manner an immemorial cuſtom muſt be pleaded, *Phips v. Jackſon*, 306

D.

DAMAGES.

1. On a demurrer to a juſtification in treſpaſs, and conditional damages taken, if entire damages be aſſeſſed, and any of the treſpaſſes are ill laid, the judgment ſhall be arreſted as to the whole, *Joſe v. Mills*, 14

2. If treſpaſs be againſt two or more, and one *demur*, and another *plead to iſſue*, the damages aſſeſſed upon *the iſſue* ſhall affect him that demurred, if the demurrer be ruled againſt him, *Leonard v. Stacey*, 69

3. If treſpaſs be for breaking a houſe, and entering into a cloſe, againſt one who pleads *not guilty* as to one, and *demurs* as to the other, the jury muſt find damages ſeverally for the *not guilty*, and conditionally upon the *demurrer*, *Leonard v. Stacy*, 69

4. On a bond conditioned to account for monies to be received, damages may be recovered beyond the amount of the penalty, *Lord Lonſdale v. Church*, 102 *notis*

5. A defendant in replevin need not pray *damages*, either upon an avowry or a plea, *Creſſe v. Bilſon*, 103

6. If an action be brought for calling a woman "*whore*," and there are alſo other words ſtated which are actionable, the judgment ſhall be arreſted, if *entire damages* be given, although the actionable words are laid with a *per quod*, *Graves v. Blanchett*, 148

7. In debt on a ſingle bond, the jury may give the amount of intereſt due in damages, *Oſbourn v. Hoſier*, 167

DEBT.

1. If money be deviſed out of lands, the devisee may have an action of debt againſt the owner of the land for the money, upon the ſtatute 32. Hen. 8. c. 1. of Wills, *Anonymous*, 27

2. If a plaintiff recover againſt an adminiſtrator, and die, his executor may maintain debt on the judgment, upon a ſuggeſtion of a *devaſtavit* by the defendant in the life-time of the executor, *Berwick v. Andrews*, 126

3. Debt lies in the king's bench on a recognizance of bail taken in the common pleas, *Shuttle v. Wood*, 133

4. Form of declaring in debt on a recognizance againſt bail, *Parkins v. Chatherton*, 159

5. Debt for rent may be brought by *a leſſor* againſt *a leſſee* in the courts at *Weſtminſter*, on a demiſe of lands in *Jamaica*; for the action is, in this caſe, on the *privity of contract*, which is tranſitory, and not on the *privity of eſtate*, which is local, *Wey v. Yally*, 194

6. In debt by an adminiſtrator on a bond againſt an heir, he need not ſhew how the defendant is heir, *Denham v. Stevenſon*, 241

7. In debt on bond for 107l. if the defendant after *oyer* plead that he was indebted to the plaintiff in 92l. 5s. 9d. and that the bond was given upon a uſurious contract, the plaintiff may reply that it was for a juſt debt, and traverſe the corrupt agreement, without ſhewing how much the juſt debt was, *Villars v. Cary*, 303

8. A plaint in debt, "*A.* complains of "*B.* &c. of a plea that he render to "him 60l. of lawful money, &c." without ſaying, "which he owes to "him, and unjuſtly detains," is bad, *Woodcock v. Morgan*, 306

DECLARATION.

1. If a declaration be of *Michaelmas Term* generally, and the fact is laid to be on the fifteenth of *November*, and ſo the action brought before the cauſe of action aroſe, yet if, on examination, it appear, that the declaration was in fact

fact after the fifteenth of *November*, it ſhall be ſet right, *Wiat Qui Tam v. Ayland*, 33

2. A declaration cannot be well delivered at *the office*, if the attorney for the defendant is well known, but it muſt be perſonally delivered to him, *Anonymous*, 153

DEED.

1. A deed in which the *year of the king* is certain is good, although *the year of Our Lord* is miſtaken, *Ford v. Grey*, 45

2. An indorſement made after the ſealing and delivery of a deed is a new deed, *Cook v. Remington*, 217

DEFAULT.

1. In a real action, if the tenant make default on *the original*, that is *before appearance*, the demandant ſhall have a *grand cape*; and if the tenant do not ſave his default, the demandant may ſign final judgment on the return of the *grand cape*, or he may releaſe the default, and continue the ſuit by further proceſs, *Staple v. Heydon*, 5

2. If the tenant in a real action make default *after appearance*, the *petit cape* ſhall iſſue; and, if the default be not ſaved, judgment may be ſigned, *Staple v. Heydon*, *ib.*

3. On a default made by a tenant in a real action, at *niſi prius* the POSTEA is marked, but the default is not recorded, *ib.*

4. But a default at *niſi prius* in a perſonal action is always recorded, and therefore there is no further proceſs to bring the defendant into court on the default being releaſed, *ib.*

5. After iſſue joined in a *perſonal action*, the defendant ſhall have but one *eſſoin* and one *default*, and this muſt be at the firſt continuance after iſſue, *ib.*

6. If a defendant *imparl* in a perſonal action, and do not appear at *the day given*, the default is peremptory, and *final judgment* ſhall be given againſt him, although the imparlance be on a *plea in abatement*, or on a *releaſe pleaded*, and a *demurrer*; and if after ſuch default a further day ſhould be given, the proceedings will be erroneous, *Staple v. Heydon*, 5

7. Where-ever, in a real action, the default is ſaveable, ſo that a *grand* or *petit cape* ſhall go, there, in a perſonal action, a default is not peremptory, 6

8. In debt, if the defendant come in upon *the exigent*, and the plaintiff *pray a day*, and the defendant make default, proceſs ſhall go to bring him in; but if the default had been to the writ, judgment ſhould be given on the default, *ib.*

9. If default be after *demurrer*, on a day given it ſhall be peremptory, by HOLT, *Chief Juſtice*, *Staple v. Heydon*, 8

10. In a *writ of annuity*, and in a writ *ſecta ad molendinum*, if the defendant make default, there ſhall be a *diſtringas* to afford him an opportunity of ſaving his default, for theſe are in the nature of real actions, 9

11. A default in a real action at the *day of niſi prius* is the ſame as at a *day in bank*, *ib.*

DEMAND.

The difference where a duty is payable on *demand*, and where it is no duty until *demand* made, *Harwood v. Turberville*, 200

DEMURRER.

1. The Court will allow amendments upon payment of coſts after demurrer joined, where the pleadings are in paper, *Godolphin v. Tudor*, 38

2. The different kinds of demurrers, *Elwis v. Lombe*, 118

DEODAND.

The *wheel of a forge*, or mill, cannot be a *deodand*, for being *fixed* to the freehold, it cannot *move* to the death of a perſon, *Reg. v. Wheeler*, 187

DEPARTURE.

1. If a day that is not material be laid in a declaration, and the defendant by his plea make it material, and then the plaintiff in his replication varies from the day in the declaration, it will be a *departure*; otherwiſe if the day had not

not been made material by the plea, *Anonymous*, 115

2. In debt on a recognizance againſt bail, if the defendant plead "no *capias* "againſt the principal," and the plaintiff reply "a *capias prout patet per* "*recordum*," A REJOINDER, that "a writ of error was allowed before the return of the *capias*," is a *departure* from THE PLEA, *Parkins v. Woollaſton*, 139

DEVISE.

1. If money be deviſed to be paid out of certain lands, the deviſee ſhall have an action of debt for it againſt the owner of the lands, *Anonymous*, 27

2. A teſtator being ſeiſed of certain *fee-farm rents*, of *lands*, and of *mines*, deviſes his *lands* to *A.* for life, with remainder in tail; and all his *mines* and 5000l. to his ſon in-law *B.*; "all "which I give and deviſe to *B.* his "executors and aſſigns, together with "all my plate and jewels, and *all my* "*other eſtate*, real and perſonal, not "otherwiſe diſpoſed of, *to be given* "*by him to his children, as he ſhall* "*think convenient, I ſolely truſting to* "*his honour and diſcretion that he will* "*give them ſuch proviſion as will be* "*neceſſary for them*; and whereas I "have contracted for the ſale of my "*fee-farm rents*, my will is, that if my "debts ſhall not be ſatisfied out of my "other eſtate, my executors (whereof "*B.* was one) ſhall and may ſell ſome "part or all of them for the payment "thereof, notwithſtanding the *rents* "are not deviſed by this my laſt "will;" and it was held, that the *inheritance* of the *fee-farm rents* paſſed to *B.* by the words "all my real and "perſonal eſtate;" for the word "*eſtate*" is *genus generaliſſimum*, and includes all things, real, perſonal, and mixed, *Counteſs of Bridgwater v. Duke of Bolton*, 106

3. If a teſtator give his executor power to ſell his eſtate for payment of his debts, the executor has only a bare authority, but does not take the eſtate, 111

4. By a deviſe of a man's "eſtate, real "and perſonal," *a freehold* will paſs, if the words are not accompanied with other particular words which expreſs a ſpecies of an inferior nature, and which can only extend to *a chattel*; for in ſuch caſe the generality of the word "*eſtate*" ſhall be reſtrained and explained by the precedent particular words, 108

5. A *will*, when the intention of the teſtator is clear, is as much to be favoured as an *heir at law*, *Anonymous*, 133

6. But if the intention of the teſtator be ever ſo apparent, the *heir at law* will inherit, unleſs the eſtate is completely diſpoſed of to another perſon, *Den v. Gaſkin*, *ib.*

7. On a deviſe to an heir at law, paying ſuch and ſuch legacies, &c. and for default thereof remainder over; the heir, until default made, is in by *diſcent*, and the other's intereſt is by way of executory deviſe, *Anonymous*, 241

DISCONTINUANCE.

In an information filed *ex officio*, if the *venire facias* be returnable on *Monday* after three weeks of *St. Michael*, and the *diſtringas* awarded on the roll with a *niſi prius* on *Saturday* after the morrow of *All Souls*, and the *diſtringas* be *teſted* the day after the return of the *venire facias*, it is a *diſcontinuance* of proceſs, *Reg. v. Tutchin*, 269

DISSENTER.

1. Previous to the 10. Anne, c. 3. a *diſſenter* might be proſecuted in the county in which he reſided, though qualified in another, *Peat's Caſe*, 228

2. But by 10. Anne, c. 3. ſ. 9. if a *diſſenting miniſter* be qualified according to THE TOLERATION ACT, he may officiate in any congregation, although the ſame be not in the county in which he was qualified, 229. *notis*

3. A *mandamus* will not lie to the juſtices of peace to ſuffer a diſſenting miniſter to preach in a licenced meeting-houſe, *Peat's Caſe*, 228

4. In what manner the qualification of a diſſenting miniſter ſhall be inrolled, *Peat's Caſe*, *ib.*

DISTRESS.

1. If a conſtable under a warrant of diſtreſs levies and *ſells* goods, but afterwards, under an idea that he had no right to ſell, he undoes the ſale, and reſtores the money to the buyer, and the goods to the owner, the Court will not grant a *mandamus* to compel him to pay the money, *Morley v. Stacker*, 83

2. A ſtatute directing a penalty to be levied *by diſtreſs*, means by diſtreſs *and ſale*, *Morley v. Stacker*, 83

3. Goods diſtrained cannot be ſold upon *credit*, *ib.*

4. A warrant of diſtreſs need not be returned, *ib.*

5. If a diſtreſs under a penal ſtatute be begun, a removal of the conviction by *certiorari* ſhall not impede the completion of it, *Morley v. Stacker*, *ib.*

6. If a leſſor be bound to repair fences, he cannot diſtrain the cattle of *a ſtranger* that have ſtrayed into the land by reaſon of his neglect to repair them, *Elmore v. Tucker*, 198

7. A poor's-rate cannot be diſtrained for by a warrant iſſued before it is due, *Tracy v. Talbot*, 214

8. A diſtreſs may be made for a quarter's rate before the end of the quarter, *Tracy v. Talbot*, *ib.*

9. A pariſh-rate may be diſtrained for in a *different pariſh* in the *ſame county*, *Tracy v. Talbot*, 215

10. In an action on the ſtatute 2. Will. and Mary, c. 5. for reſcuing a diſtreſs, if the plaintiff ſtate that he was ſeiſed in fee of the premiſes, and demiſed them by parol for *a year, and ſo from year to year*, he muſt prove the ſeiſin *in fee*; but he need not either ſtate or prove that he gave warning, *Dod v. Monger*, 215

11. If a landlord ſeize upon ſome goods as a diſtreſs, in the name of all the goods in the houſe, it will be a good ſeizure of all, *Dod v. Monger*, 216

12. Within what time goods diſtrained for rent-arrear muſt be removed, *Dod v. Monger*, *ib.*

13. If a landlord has ſeized goods as a diſtreſs for rent, and quitted them two intervening nights, the retaking of them is not a reſcue within 2. Will. and Mary, c. 5. *Dod v. Monger*, 216

14. If a landlord diſtrain barrels of beer, and draws beer out of the barrels, he is a treſpaſſer *ab initio*, *ib.*

15. But by 11. Geo. 2. c. 19. diſtreſſes for rent ſhall not be deemed unlawful for any irregularity or unlawful act afterwards, nor the party deemed a treſpaſſer *ab initio*, 216 *notis*

DUCKING.

Ducking is the legal puniſhment for being a *common ſcold*, *Reg. v. Foley*, 11

E.

EJECTMENT.

1. If an attorney procure a declaration in ejectment to be delivered to a perſon ſent upon the premiſes for the purpoſe of repreſenting the tenant in poſſeſſion, and afterwards, upon the common affidavit of ſervice, obtain a fraudulent judgment againſt the caſual ejector, and thereby turn the real tenant fraudulently out of poſſeſſion, yet the Court will not grant an attachment in the firſt inſtance, *Holderſtaffe v. Saunders*, 16

2. Poſſeſſion muſt be actually delivered to a plaintiff in ejectment, under the writ of *habere facias*, or the writ is not compleatly executed; and on its being returned, and the circumſtances ſtated, the Court will grant a new writ, *Kingsdale v. Mann*, 27

3. In ejectment, the poſſeſſion of one joint-tenant is the poſſeſſion of the other, ſo as to prevent the ſtatute of Limitations, *Ford v. Grey*, 44

4. In ejectment, if the tenant be tricked out of poſſeſſion, the Court will order reſtitution, and commit the parties to anſwer interrogatories, *Saunders v. Meiluiſh*, 73

5. In

5. In ejectment, *the term* ſhall not be enlarged without conſent, though the plaintiff was prevented by injunction from proceeding within the time, *Anonymous*, 130

6. An ejectment in *Ireland* for "*a kneave* "*of land*," is good; for it is a denomination of quantity well known in that kingdom, *Heins v. Hancock*, 140

7. The *venue* in ejectment muſt be where the land lies, *Anonymous*, 222

8. If there be judgment in ejectment for *two meſſuages*, a *ſcire facias* to revive it, reciting a judgment for *one meſſuage* only, cannot be amended; but the plaintiff may take out a new writ, *Williams v. Hoſkins*, 310

ERROR.

1. It is *error* to award *a repleader* where it ought not to iſſue, or to refuſe it where it ought to iſſue, *Staple v. Heydon*, 2

2. In an action in an inferior court, if the defendant on being eſſoined make default, and a further term be given, the proceedings are erroneous, for, on the default, final judgment ought to have been given, *Staple v. Heydon*, 5

3. If, at a day given upon a writ of error, the defendant make default, the writ of error may go on, and the judgment be affirmed, *Staple v. Heydon*, 10

4. Bail muſt be filed on a writ of error being brought in the king's bench on a judgment in debt on bond obtained in the court of common pleas, *Scott v. Brace*, 38

5. If two ſuitors bring a writ of error, and upon the *ſcire facias* make two attornies, and one of the attornies aſſigns error, on which the defendants take iſſue, and then the other attorney pleads in abatement of the writ, there cannot afterwards be a ſeverance, *Shepheard and Bailey v. Orchard*, 40

6. A writ of error directed to the Judge of an inferior court, to remove a record *coram vobis*, without naming him, is good, although the record was before his predeceſſor, *Evans v. Roberts*, 61

7. To a writ of error to an inferior court the Judge may return that there came another writ of error to him before that writ, bearing the ſame *teſte* and return, *Evans v. Roberts*, 61

8. If *want of an original* be aſſigned for error, and *a releaſe* be pleaded, yet *a certiorari* to inform the Court whether there was any *original* or not, may be awarded in the ſame manner as if "*in nullo eſt erratum*" had been pleaded; but the party cannot demand it of right, *Carlton v. Mortagh*, 113. 206

9. The allowance of a writ of error is of itſelf a *ſuperſedeas*, and the ſervice of it is only to bring the party into contempt, *Jacques v. Nixon*, 130

10. A record in treſpaſs *vi et armis* is not removed by a writ of error on a judgment in treſpaſs *on the caſe*, *Kent v.* ——, 138

11. The miſpriſion of the clerk in making out a writ of error may be amended, *Keat's Caſe*, *ib.*

12. A writ of error cannot be quaſhed until it is entered on the roll, *ib.*

13. On a writ of error on a judgment from *Wales*, a *certiorari* to inform the Court may iſſue, although the record has been before amended, *Lewis v. Jones*, *ib.*

14. If the want of an *original* be aſſigned for error, and the defendant appears and alledges *diminution*, and, upon a *certiorari* granted, a *variant original* be certified, yet he may, at a *day given*, ſuggeſt a *right original* of another Term, and have another writ of *certiorari* thereon; but there muſt be previous notice to the plaintiff of this ſuggeſtion, and the *new certiorari* muſt be *filed* in the office, or the proceedings will be irregular, *Barnaby v. Sanderſon*, 174

15. To a writ of error on a judgment for being a *common ſcold*, the defendant muſt aſſign error in perſon, *Reg. v. Foxby*, 178

16. The moſt uſual way of bringing a writ of error upon an indictment, is to remove the record into the crown-office

office by *certiorari*, and then to ſue out a writ of error *coram nobis*, *Reg. v. Foxby*, 178

17. On a writ of error on an indictment for being a *common ſcold*, if the defendant be ſo ill that ſhe cannot aſſign error in perſon, the Court, on affidavit, will enlarge the time, *Reg. v. Foxby*, 213

18. If the record be not certified on the return of a writ of error, the party may take out execution, *Anonymous*, 221

19. Error of a judgment in the marſhal's court, *Stanyon v. Davis*, 223

20. On a writ of error, and bail put in, the defendant has *twenty days* to except againſt the bail, which exception ought to be entered in the clerk of the errors book, *Gibbon v. Dove*, 230

21. In error on a judgment in debt, if the defendant plead "releaſe of errors," the plaintiff cannot reply that the releaſe was of errors in another judgment, and traverſe its application to the judgment in queſtion, *Davenant v. Rafter*, 236

22. Upon a writ of error, if the clerk below will certify the record wrong, an action on the caſe will lie againſt him for it; and if he make no return, the plaintiff may have a writ *de executione judicii* out of chancery, *Anonymous*, 245

23. If a writ of enquiry be returnable *tres Trinitatis*, which is on a *Sunday*, and is returned to have been executed on the ſucceeding day, *Monday*, the judgment founded thereon is erroneous; and the Court will take notice of this defect judicially, although there be no writ of error, and although it be not aſſigned for error on the record, *Davy v. Salter*, 251

ESCAPE.

1. If a priſoner for debt eſcape, and be re-taken on an eſcape-warrant, the Court will not diſcharge him on his bringing the money into court, *Hotherſhell v. Bows*, 21

2. In debt on bond, if the plaintiff be a priſoner in the Fleet, and is taken and re-committed on an eſcape-warrant, and the defendant make an affidavit that nothing is due, he, the defendant, ſhall be diſcharged on common bail; for as the commitment of the defendant on the eſcape-warrant is a commitment in execution, and he is thereby prevented from going before a Judge at chambers to contradict the defendant's affidavit, it ſhall be taken to be true, the inability of the plaintiff proceeding from his own wrong, *Collar v. Martin*, 63

3. If a perſon committed on an *excommunicato capiendo* eſcape, a new writ ſhall iſſue if the ſheriff have not returned the old writ, or the party been removed by *habeas corpus*, *Reg. v. Ball*, 79

4. A priſoner who has eſcaped may be re-taken on *a Sunday*, either by the officer on *freſh purſuit*, or by virtue of an *eſcape warrant*, *Parker v. More*, 95

5. But if *A.* be arreſted at the ſuit of *B.* and be diſcharged by the ſheriff's not knowing that there was a detainer againſt him at the ſuit of *C.* and be arreſted on the *Sunday* following at the ſuit of *C.* this is an *original taking*, and not a *re-taking* after an eſcape; and therefore he ſhall be diſcharged from this arreſt by virtue of 29. Car. 2. c. 7. *Atkinſon v. Jameſon*, 95 *notis*

6. An action for an eſcape from *the Compter* muſt be brought againſt both the ſheriffs, *Anonymous*, 96

7. An eſcape-warrant granted on the 1. Anne, c. 6. muſt be executed by *a conſtable* or other legal officer; and therefore, although ſuch a warrant may be *granted* to *private perſons*, yet if executed by them, the party ſhall not, purſuant to the ſtatute, be committed to the *common gaol*, but to the priſon from whence he eſcaped, *Rich v. Doughty*, 154

8. There can be no eſcape, unleſs the party has been legally arreſted, *Genner v. Sparks*, 174

9. A priſoner ſuffered voluntarily to eſcape by one MARSHAL, may, on a voluntary ſurrender, be lawfully detained by his ſucceſſor, *Grant v. Southers*, 183

10. A ſheriff is not liable for an eſcape, unleſs the priſoner was legally delivered to him by the former ſheriff, or legally arreſted by his own officers, 183 *notis*

11. The voluntary return of a priſoner who has eſcaped is, if before action brought, equal to a re-taking upon freſh purſuit, 183 *notis*

12. A bond given to ſave a gaoler harmleſs againſt *paſt eſcapes* is good, but not againſt *future eſcapes*, *Fox v. Tilly*, 225

13. If a principal be committed to a tipſtaff on a ſurrender at a Judge's chambers, and eſcapes, the bail are liable, *Anonymous*, 239

14. If a priſoner in cuſtody of THE MARSHAL on *meſne proceſs* eſcape, and being re-taken on an eſcape-warrant under the 1. Anne, c. 6. is committed to NEWGATE, and diſcharged therefrom on his entering into an agreement with and by the conſent of his creditor, he cannot be re-taken on a ſecond eſcape-warrant for not performing his agreement, or detained on his being afterwards in the cuſtody of THE MARSHAL at the ſuit of another creditor, *Tilſden v. Parfriman*, 294

ESCROW.

In what caſes a written obligation delivered as an *eſcrow* ſhall become *a deed*, *Buſhel v. Paſmore*, 217

ESTATE.

1. The word "*eſtate*" is *genus generaliſſimum*, predicable of two ſpecies that have their difference whereby they are divided, viz. *real eſtate* and *perſonal eſtate*, 107

2. REAL ESTATE is *genus ſubalternum*, and its ſpecies are real eſtate *in fee*, and real eſtate *for life*, *ib.*

3. PERSONAL ESTATE is alſo a general term, conſiſting of two ſpecies, chattel real and chattel perſonal; but the ſpecies "chattel real" is not becauſe it is a real eſtate, but becauſe it has a real extraction, 107

4. The word "*eſtate*," therefore, comprehends both freehold and chattels, as well real as perſonal, 108

5. If a man be ſeiſed in fee, and deviſe his *eſtate*, the inheritance ſhall paſs without any other circumſtance to manifeſt his intent, 109

ESTOPPEL.

If judgment be obtained in *Michaelmas Term*, and a *ſcire facias* be brought thereon againſt the *terre-tenants* returned, and on "*nul tiel record*" pleaded judgment is given for the plaintiff, and an *elegit* ſued out, and an ejectment brought upon the *elegit*, and it is found by ſpecial verdict that the *ſcire facias* recited a judgment of *Trinity Term*; this, if diſcovered on the trial of the iſſue of "*nul tiel record*," muſt prevail as a *failure* of record; but after the fact has been judicially tried and aſcertained, the *terre-tenants* returned are ESTOPPED by the award of execution on the judgment in the *ſcire facias* from taking advantage of this variance; and ſo are the *terre-tenants* not returned, if they do not ſhew a title paramount to the judgment in the *ſcire facias*, *Trevivan v. Lawrence*, 256

EVIDENCE.

1. If a declaration in treſpaſs for entering a wood, cutting ſo many loads of timber, and carrying them away, be laid with a *continuando* as to the cutting, it is bad as to that part of the treſpaſs, and therefore on the trial, the Judge ought not to ſuffer any thing to be given in evidence but the firſt act, *Monckton v. Aſpley*, 40

2. In ejectment, in proving an entry and claim, it is neceſſary to prove the claim to be upon the land, and alſo that it was made *animo clamandi*, *Ford v. Grey*, 44

3. The recital of a leaſe in a deed of releaſe, is good evidence of a leaſe againſt

againſt the releaſor, and thoſe that claim under him, 44

4. In ejectment, if a fine be produced but no deed declaring the uſes, a deed reciting a deed of limitation to uſes, may be read in evidence, and on proof that the deed recited once exiſted and is loſt, ſuch recital is good evidence of its contents, *Ford v. Grey*, 45

5. If a ſtatute inflict a penalty on every perſon in whoſe cuſtody *game* is found, the party cannot be convicted without its being *proved* that it was in his cuſtody, *Reg. v. George*, 57

6. Defendants under a *ſimul cum* in an action of treſpaſs may be witneſſes for the plaintiffs, if no evidence is given againſt them, *Leonard v. Stacey*, 69

7. If a maſter bring an action of covenant againſt his apprentice for leaving his ſervice at ſuch a time, and the defendant juſtifies by virtue of *a licence*, the maſter cannot give evidence of a leaving him at another time, *Anonymous*, 70

8. The days on which writs are made returnable need not be proved, for the Court is bound to take notice of them, 81

9. The copy of a warrant of diſtreſs is good evidence to prove a diſtreſs made, *Morley v. Stacker*, 83

10. A witneſs who attends voluntarily to give evidence on a trial is intitled to his expences, *Anonymous*, 140

11. In an action by an executor againſt a perſon who has received money due to the teſtator, the *original debtor* is not a competent witneſs to prove the payment of the money, *Clerk v. Dealy*, 151

12. An order of the court of chancery cannot be given in evidence without producing a copy of the bill on which it was made, *Turner v. Nurſe*, 149

13. A commiſſion out of chancery to abut and bound certain land, returned and acquieſced under, and an enjoyment accordingly, is good evidence that the land ſo bounded is rightly bounded, *Turner v. Nurſe*, 149

14. In an action upon a wager, whether a decree of the court of chancery would be reverſed on appeal to the houſe of lords, *a copy* of the reverſal is ſufficient evidence without producing the *minute book* itſelf, and ſuch copy need not be on ſtamps, *Jones v. Randall*, 149 *notis*

15. A bare commiſſion out of chancery, though returned, is no evidence at all, *Turner v. Nurſe*, 149

16. A copy from the crown office of the writ and return to a *mandamus* is ſufficient evidence againſt the party on the trial of an information for a falſe return, *Reg. v. Chapman*, 152

17. On an information againſt a mayor for making a falſe return to a *mandamus*, it is not neceſſary to prove that the writ was delivered to the mayor, 152

18. In debt againſt a ſheriff for permitting an eſcape, the indorſement of *non eſt inventus* upon the *ca. ſa.* is ſufficient evidence of its having been delivered to him, *Blatch v. Archer*, 152 *notis*

19. The bailiff's name indorſed on the writ is ſufficient evidence that he was authoriſed by the ſheriff, without proving the warrant, *Blatch v. Archer*, 152 *notis*

20. In treſpaſs, matter of *right* muſt be pleaded, for it cannot be given in evidence on *not guilty*, *Dover v. Smith*, 153

21. In a cauſe in which the members of a corporation are intereſted, if any of them are disfranchiſed, and have no intention or expectation of being received again into the corporation, they are competent witneſſes, although they were disfranchiſed for the purpoſe of enabling them to give their teſtimony, *Skinners Company v. Jones*, 167

22. Compariſon of hands is good evidence to prove the atteſtation of a bond, *Oſborne v. Hoſier*, 167

23. If a perſon having a number of trees planted in boxes, deſire another to let them ſtand in his garden and permit his

his gardener to take care of them, the gardener is a good witneſs on an action of trover brought by the owner of the trees againſt the alienee of the garden, *Oliver v. Vernon*, 170

24. "*Son aſſault*" may be given in evidence under the general iſſue on an indictment, but in an action it cannot be proved unleſs ſpecially pleaded, *Reg. v. Cotesworth*, 172

25. In an action brought by a woman for breach of a promiſe of marriage, if an expreſs promiſe be proved on the part of the man, and it appear that the woman countenanced it, and by her actions at the time behaved herſelf ſo as if ſhe agreed to it, though no actual promiſe be proved, it ſhall be ſufficient evidence of a promiſe on her ſide, *Hutton v. Manſill*, 172

26. An *order of filiation*, while unreverſed, is concluſive evidence that the perſon charged is the reputed father, *Reg. v. Beſt*, 185

27. In an action on the caſe for reſcuing a perſon arreſted on *meſne proceſs* at the plaintiff's ſuit, the writ and warrant may be proved by producing ſworn and examined copies of them; evidence muſt alſo be given of a legal arreſt and of the original cauſe of action; and evidence ought alſo to be given that the plaintiff thereby loſt the opportunity of recovering his money, *Wilſon v. Gray*, 211

28. In an action of debt for an eſcape againſt the ſheriff, the indorſement of *non eſt inventus* upon the *ca. ſa.* is ſufficient evidence of its being delivered to the ſheriff, 211 *notis*

29. In an action for a reſcue, the party reſcued is a competent witneſs, *Wilſon v. Gray*, 211

30. In an action on 2. Will. and Mary, c. 1. for reſcuing a diſtreſs, if the plaintiff ſtate that he was ſeiſed in fee of the premiſes, and demiſed them by parol for a year, and ſo from year to year, he muſt prove the *ſeiſin in fee*, but he need not prove that he gave the tenant warning, *Doe v. Monger*, 225

31. In an action for a malicious proſecution for *felony*, the plaintiff ought to produce a copy of the indictment, and that the indictment was found on the oaths, or by the procurement of the defendants, but their names being on the back of the bill is of itſelf ſufficient evidence that they were ſworn on the bill, *Johnſon v. Browning*, 216

32. But it may be proved that the defendant was a witneſs on the indictment, without producing a *copy of the indictment*, *ib.*

33. But it is ſaid that it is only where the proſecution was for a *miſdemeanor*, that a copy of the indictment is not neceſſary; for that where the malicious charge was for *felony*, a copy of the indictment muſt be produced, *Morriſon v. Kelly*, 217 *notis*

34. On an action for a malicious proſecution for felony, the defendant, to ſhew a *probable cauſe* for the proſecution, muſt prove that a felony was committed, *Johnſon v. Browning*, 216

35. Or ſhew a fair and reaſonable ground for ſuſpecting the guilt of the plaintiff, 217 *notis*

36. If on an action for a malicious proſecution it appear that no one is pretended to have been preſent at the time the ſuppoſed felony was committed except the defendant's wife, the depoſition which ſhe gave on the trial of the indictment may be read in evidence, although it is a general rule that a wife cannot give evidence either for or againſt her huſband, *Johnſon v. Browning*, 216

37. Special *non eſt factum* bring all the proof upon the defendant, 218

38. If an ancient deed be loſt, the counterpart, with other circumſtances, may be given in evidence, but the counterpart of a deed leading the uſes of a fine is, of itſelf, good evidence, *Anonymous*, 225

39. A declaration in debt on bond, conditioned to pay "to *A.* his attorney or "aſſigns," is maintained by evidence of a bond "to pay to the attorney of "*A.* or

" *A.* or his aſſigns," *Robert v. Harnage*, 228

40. A married woman may give *coverture* in evidence under the general iſſue, *Anonymous*, 230

41. To prove a leaſe made to the crown a copy of the inrollment of it muſt be produced, *Stillingfleet v. Parker*, 248

42. A declaration for maliciouſly indicting the plaintiff for *barratry* without probable cauſe, ſtating that he was in due manner thereupon diſcharged, is not maintained by evidence that he was diſcharged by means of a *nolle proſequi* entered by the attorney-general; but if he had pleaded " *not guilty*," and the attorney-general had *confeſſed* the plea, evidence of that confeſſion would have maintained the declaration, *Goddard v. Smith*, 262

43. If one of ſeveral partners receive money on the joint account, and give his *note* for it, and enter his expenditures in the partnerſhip books, and then the other partners poſſeſs themſelves of the books, and bring an action againſt him for the money he received, the Court will not order the plaintiffs to produce the books in evidence at the trial; but the defendant may give them *notice* ſo to do, and thereby raiſe a preſumption againſt them if they refuſe, *Ward v. Apprice*, 264

44. On an indictment againſt a county for not repairing a public bridge, the inhabitants of the diſtrict in which the bridge is ſituated are good witneſſes, *Reg. v. Wilts*, 307

45. A declaration on a promiſe made to a teſtator is not maintained by evidence of a promiſe made to his executor, *Dean v. Crane*, 310

EXECUTOR.

1. Where a plaintiff ſues as executor, the defendant cannot pay money into court to have it ſtruck out of the declaration, *Anonymous*, 29

2. If a teſtator give his executor power to ſell certain eſtates for the payment of his debts, in caſe his other eſtate ſhould be inſufficient, the executor has a bare *authority*, and does not take the eſtate, *Bridgwater v. Bolton*, 111

3. If a plaintiff recover againſt an adminiſtrator and die, his executors may maintain debt on the judgment upon a ſuggeſtion of a *devaſtavit* by the defendant in the life-time of his teſtator, *Berwick v. Andrews*, 126

4. If a wife be made executrix, and huſband and wife bring an action, on the part of the wife, as executors for money had and received to their uſe in right of the wife as executrix, they ſhall pay coſts on being nonſuited, *Jenkins v. Plombe*, 92

5. When the cauſe of action is money due, or a contract to be performed, or ariſes from the gain or acquiſition by the labour or property of another, or from a promiſe made by a teſtator or inteſtate expreſſed or implied, the action ſurvives againſt his *perſonal repreſentatives*; but if it be a *tort*, or ariſe *ex delicto*, ſuppoſed to be againſt the peace, or where the plea to the action muſt be that the teſtator or inteſtate was *not guilty*, the right of action dies with the perſon, *Hambly v. Trott*, 127 *notis*

6. The ſtatute 8. and 9. Will. 3. c. 11. reſpecting coſts, does not extend to execution, 137 *notis*

7. If a plaintiff ſue an executor, and die inteſtate, after *interlocutory judgment*, and before a *writ of enquiry* returned, and his adminiſtrator ſues a *ſcire facias* on the judgment, the defendant cannot plead " *judgment recovered* againſt him in debt on bond, " and that he has no aſſets *ultra*;" for the ſtatute 8. and 9. Will. 3. c. 11. does not authorize a *perſonal repreſentative* to make any other defence than his teſtator or inteſtate might have made to the *writ of enquiry*, *Smith v. Harmon*, 142

8. In an action brought by an executor againſt a perſon who had received money due to the teſtator, the *original debtor* is not a competent witneſs to prove

prove the payment of the money, *Clark v. Dealey*, 151

9. *Trover* and not *assumpsit* lies by an executor for money taken out of the testator's room after his death, *Clark v. Dealey*, 151

10. If an executor give a person a sum of money on his promising to deliver up certain writings then in his possession, belonging to the testator, and he afterwards refuses to perform his promise, the executor may recover back the money so paid by *indebitatus assumpsit*, *Holmes v. Hall*, 161

11. The wife of a popish recusant cannot be executrix to her husband, *Ride v Ride*, 239

12. If an executor suffer judgment to go by default, it is an admission of assets, *Treil v Edwards*, 308

13. A declaration on a promise made to a testator is not supported by evidence of a promise made to his executor, *Dean v. Crane*, 310

EXECUTION.

1. The execution of an *habere facias possessionem* is not complete until actual possession be given, *Kingsdale v. Mann*, 27

2. Same point, 115

3. A person in execution cannot be charged with a civil action without leave of the court, *Anonymous*, 88

4. If execution be sued out before *writ of error* is allowed, or notice given, the goods or money levied shall not be restored, *Parkins v. Woolaston*, 130

5. A writ may be well executed on the day of its return, although it be after the rising of the Court, *Parkins v. Woolaston*, 130

6. If a *fieri facias* be taken out, and the goods levied before judgment entered on the roll, and another *fieri facias* is delivered to the sheriff upon another judgment, to which he returns *nulla bona*, and then the goods are sold under the first writ, and satisfaction entered, but the roll not filed; the Court will not, on an action brought by the *second plaintiff* against the sheriff for a *false return*, give the *first plaintiff*, who had indemnified the sheriff, leave to file his roll, *Herring v. Crocker*, 165

7. If the record be not certified on the return of a writ of error, the party may take out execution, *Anonymous*, 221

8. If only part of a debt be levied on a *fi. fa.* the plaintiff may have a *ca. sa.* for the residue, *Anonymous*, 223

9. If judgment be signed under an agreement to stay execution for *a year*, execution may, after the year, be taken out without a *scire facias*; but not if *the stay* be only for *three months*, and the execution afterwards hindered by *injunction*, *Booth v. Booth*, 288

10. *Sed quære.* See *Winter v. Lightbound* and *Mitchel v. Cue*, 288 *notis*

11. If *A.* obtain a judgment against *B.* and sue out a *fieri facias*, on which the sheriff takes the goods of *B.* in execution, the debt is discharged by such seizure; and if *A.* die after such seizure, and the sheriff be removed before *the sale*, the succeeding sheriff may compel his predecessor to sell them; and therefore *B.* cannot sue out a *scire facias* against *him* to have restitution of the goods; for the death of *A.* does not abate the execution, *Clerk v. Withers*, 290

EXCOMMUNICATO CAPIENDO.

If a person committed on an *excommunicato capiendo* escape, a new writ shall issue if the sheriff have not returned the old writ, or the party been removed by *habeas corpus*, *Reg. v. Ball*, 79

EXPOSITION OF WORDS.

1. *Alta via regia*, 255
2. Causing, procuring, &c. 99
3. *Colore*, &c. 170
4. *Communia*, 256
5. *Conquer antur*, 56
6. Costs, 157

7. *Debet*

7. *Debet et solet*, 312
8. Default of another, 249
9. *Dimidia pars*, 231
10. Estate, 107. 109, 110
11. *Falsè et malitiosè*, 32
12. *Inde*, 262
13. Kneave of land, 140
14. *Liberum tenementum*, 117, 118
15. *Malitia præcogitatâ*, 33
16. *Medietas*, 231
17. *Piscerunt*, 183
18. *Prætensum*, 302
19. *Prætentum*, 170
20. *Prætextu*, &c. *ib.*
21 *Procuravit*, 32
22. *Publicus*, 256
23. Remainder, 112
24. Residue, 108
25. *Secundum cons. curiæ*, 61
26. *Solebat*, 312, 313
27. *Statum*, 109
28. Subornation, 202
29. *Unacum*, in a devise, 108, 109
30. *Via regia*, 255
31. *Volentibus*, 188
32. Extortion, &c. 192

EXTORTION.

1. An indictment for extorting "divers "sums of money" is not good, for it is too uncertain; it ought to shew the precise sums that were taken, and the pretence upon which they were taken, *Reg. v. Tracy*, 31
2. It is extortion in a clerk of the peace or other officer to take fees when none are due, or a greater fee than is due, or to take any fees before they are due, *Reg. v. Baines*, 194

F.

FALSE TOKEN.

1. What shall be considered a false token, 302

See CHEAT.

FALSE IMPRISONMENT.

To an action of false imprisonment against a sheriff, a justification that the plaintiff was brought to him in the custody of one *R.* and others to him unknown, by virtue of a warrant, and that he detained him in custody according to the exigency of the said warrant, is bad, *Rich v. Doughty*, 154

FAST-DAY.

If a tradesman keep open shop on a *fast-day* ordained by proclamation, it is an indictable offence, *Anonymous*, 210

FEME COVERT.

1. A wife indicted by her husband may plead *in formâ pauperis*, 88
2. A wife after bail-bond given may plead *misnomer*, 311
3. A wife arrested may be discharged on common bail, 105
4. A wife, after parting from her husband by consent, and living on a separate maintenance, cannot charge her husband with debts, even for necessaries, especially if she live in *adultery* with another man, 147
5. A wife, on *non assumpsit* pleaded, may give *coverture* in evidence, 230

See HUSBAND AND WIFE.

FENCES.

1. If a lessor be bound to repair fences, he cannot distrain the cattle of a *stranger* that have strayed into the land by reason of his neglect to repair them, *Elmore v. Tucker*, 198
2. An action on the case for not repairing fences, whereby another party is damnified, can only be maintained against the *occupier*, and not against the owner of the fee, who is not in possession, *Cheesham v. Hampson*, 198 *notis*

FEOFFMENT.

If a *feoffment* be pleaded in satisfaction of *a bond*, the acceptance must be laid in the county where the feoffment was made, *William v. Farrow*, 82

FIERI FACIAS.

1. If a *fieri facias* be taken out, and the goods levied before judgment entered on the roll, and another *fieri facias* is delivered to the ſheriff on another judgment, to which he returns *nulla bona*, and then the goods are ſold under the firſt writ, and ſatisfaction entered, but the roll not filed; the Court will not, on an action brought by the *ſecond plaintiff* againſt the ſheriff for a *falſe return*, give the *firſt plaintiff*, who had indemnified the ſheriff, leave to file his roll, *Herring v. Crocker*, 184, 185

2. If *A.* obtain judgment againſt *B.* and ſue out a *fieri facias*, on which the ſheriff takes the goods of *B.* in execution, the debt is diſcharged by ſuch ſeizure; and if *A.* die after ſuch ſeizure, and the ſheriff be removed before *the ſale*, the ſucceeding ſheriff may compel his predeceſſor to ſell them; and therefore *B.* cannot ſue out a *ſcire facias* againſt *him* to have reſtitution of the goods; for the death of *A.* does not abate the execution, *Clerk v. Withers*, 290

FINE.

1. A fine levied by one of two jointenants in fee of the whole eſtate is a ſeverance of the jointenancy, but does not amount to an *ouſter* of his companion, *Ford v. Grey*, 45

2. If a man, ſeiſed of a manor, levy a fine of the *demeſnes* of the manor, the manor is gone for ever, 45

3. If a perſon ſeiſed of an eſtate as heir *ex parte materna* levy a fine *ſur grant et render*, the eſtate ſhall go *ex parte paterna*; but it is otherwiſe of other fines, *Ford v. Grey*, 45

4. A fine is erroneous, if any of the proclamations are on a *Sunday*, *Fiſh v. Brocket*, 196

FISH.

1. Every ſubject, of common right, may fiſh with lawful nets in a navigable river as well as in the ſea, *Warren v. Matthews*, 73

2. The crown has only a right to royal fiſh, *ib.*

3. An indictment lies for fiſhing in the private pond of another, *Reg. v. Steer*, 183

4. There needs no privilege to make a fiſh-pond, *Anonymous*, *ib.*

FORCIBLE ENTRY.

1. An inquiſition of forcible entry into a copyhold eſtate, alledging, that the party was ſeiſed of a cuſtomary eſtate in fee *at the will of the lord*, without alledging that it was *demiſed* and *demiſable*, is bad, *Cooper's Caſe*, 90

2. If a new-appointed marſhal make a forcible entry into the priſon, the Court will not reſtore the former marſhal on motion, 91

3. An inquiſition of forcible entry is good, though the caption omit to ſay, that the jurors were ſworn "*to enquire for the body of the county*," *Reg. v. Watton*, 95

4. An indictment of forcible entry is good, although it omit the words *manu forti*, *Reg. v. Dyer*, 96

5. If a traverſe be tendered to an inquiſition of forcible entry, reſtitution ſhall not be granted, *Anonymous*, 115

6. A *mandamus* lies to juſtices to enquire of forcible entry, *Anonymous*, 138

7. If a forcible entry be committed, and all the juſtices of *the corporation* refuſe to enquire of the force, the inquiſition may be taken by juſtices of the county, *Caly v. Hardy*, 164

FOREIGN ATTACHMENT.

1. If goods are conſigned to three perſons *in truſt*, and the goods are attached in *London*, one of the conſignees cannot appear without the others, *Smith v. Mayor of London*, 78

2. A *certiorari* does not lie to remove a *foreign attachment*, *ib.*

FRAUD.

See CHEAT.

FREIGHT.

The captain of a ſhip may detain the cargo for the payment of the freight; but if he once part with the goods, he can only have his remedy againſt the perſon of the conſignee, to whom they are delivered, *Tranter v. Watſon*, 13

G.

GAME.

What proof is neceſſary to be given of a perſon's having game found in his cuſtody, 57

GAMING.

An *indebitatus aſſumpſit* will not lie to recover money won at play, *Smith v. Aiery*, 128

GAOL-DELIVERY.

1. The gaol-delivery ought, of common right, to be within the proper county; but by cuſtom time out of mind it may be held out of the county, *Anonymous*, 145
2. The gaol-delivery of the county of *Middleſex* is held by preſcription in the city of *London*, *ib.*

GAVELKIND.

1. *Gavelkind* is a general cuſtom, 120
2. The difference between *gavelkind* and *Borough Engliſh*, 121

GOOD BEHAVIOUR.

1. A perſon who ſpeaks unmannerly or diſreſpectful words of a mayor or juſtice of the peace may be bound to his good behaviour, *Reg. v. Langley*, 125
2. In what caſe ſurety for *good behaviour* may be taken, *Dennis v. Lane*, 131
3. If a perſon ſurrender, on proclamation, to a ſecretary of ſtate, on a charge of miſdemeanor, the ſecretary may bind him to appear in the king's bench, but cannot oblige him to give ſureties for his good behaviour, *Reg. v. Tutchin*, 185

GRANT.

The king may grant the liberty of taking royal fiſh; but ſuch a grant will not exclude others from fiſhing with lawful nets in the ſea or in navigable rivers, *Warren v. Mathews*, 73

H.

HABEAS CORPUS.

1. If a perſon come in on *habeas corpus*, and give bail, yet, if it be not at the return of the proceſs, he cannot give rules, but muſt wait two Terms; and then if there be no declaration, he ſhall be diſcharged on common bail, *Hotherſhell v. Bows*, 22
2. The court of king's bench will not try the validity of a bye-law upon the return to a *habeas corpus*, except in the caſe of a bye-law made by the *city of London*, *Cudden v. Provoſt*, 123
3. If one be in cuſtody upon a criminal, and alſo upon a civil matter, there ought, in order to remove him, to be but one *habeas corpus*, either on the crown ſide, or on the plea ſide, *Southers' Caſe*, 133
4. Upon the return to a *habeas corpus*, grounded on a cuſtom of the city of *London*, the Court will firſt order the return to be filed for the purpoſe of controverting the cuſtom in an action for a falſe return, *Fazakerley v. Balaye*, 177
5. The Court will not enter into the validity of a bye-law upon the return to a *habeas corpus*, except in the caſe of the city of *London*, *Ballard v. Bennett*, 178 *notis*
6. When a perſon is brought up by *habeas corpus*, the return ſhall remain in court, and a copy of it only be given to the marſhal, *Anonymous*, 180

HABERE FACIAS POSSESSIONEM.

1. A writ of *habere facias poſſeſſionem* is not completely executed until an actual poſſeſſion be given, *Kingſdale v. Mann*, 27
2. If a perſon be turned out of poſſeſſion recently after it has been delivered to him under an *habere facias poſſeſſionem*, the Court, on the firſt writ being returned, and the ſpecial circumſtances of the *ouſter* ſtated, will grant a new writ, 27
3. Upon an *habere facias poſſeſſionem*, the execution is not complete until the bailiff deliver the poſſeſſion, and is gone, *Anonymous*, 175

HAND.

The puniſhment for ſtriking in a royal palace is, that the offender's hand ſhall be cut off, *Burchett's Caſe, cited*, 76

HEIR.

1. It is hard to maintain, either by uſe or deviſe, a remainder to a ſtranger after a preſent fee to one who is not heir at law, 241
2. In debt by an adminiſtrator on a bond againſt an heir, it is not neceſſary to ſhew how the defendant is heir, *Denham v. Stevenſon*, 241

HERIOT SERVICE.

What ſhall be conſidered *heriot-ſervice*, and how it may be pleaded, *Smarth v. Penhallow*, 64

HOMINE REPLEGIANDO.

The original writ of *homine replegiando* is *vicontiel*; and as no addition is required to the defendant's name therein, ſuch addition need not be inſerted in an *alias* or *pluries*, *Lord Banbury v. Wood*, 84

HOSTAGE.

See RANSOM.

HOUSE.

If a houſe, originally entire, be divided into ſeveral apartments, with an outward door to each apartment, and no communication with each other, the ſeveral apartments ſhall be rated as diſtinct manſion-houſes; but if the owner live therein, all the tenanted apartments ſhall be conſidered as parts of the houſe, *Tracy v. Talbot*, 214

HUSBAND AND WIFE.

1. If a wife be arreſted, ſhe ſhall be diſcharged on filing common bail; but in an action againſt huſband and wife, if the huſband be arreſted he muſt find bail both for himſelf and his wife, *Corniſh v. Marks*, 17
2. *Sed quære*; and ſee *Clerk v. Norris*, 1. *H. Bl. Rep.* 235. *cited*, 17
3. In an action againſt huſband and wife, the huſband muſt file appearance for his wife, *Wigg v. Rook*, 86
4. If a wife poiſon her huſband's cows, and the huſband indicts her, ſhe may be admitted to defend *in forma pauperis*, 88
5. If a wife be made executrix, and the huſband and wife bring an action, on the part of the wife, as executrix, for money had and received to their uſe in right of the wife as executrix, they ſhall pay coſts on being nonſuited; for the receipt of the money for which the action is brought being ſubſequent to the death of the teſtator, the cauſe of action aroſe in their own time, and therefore it was not neceſſary to name the wife executrix, *Jenkins v. Plumb*, 92. 181
6. If a *feme covert* be arreſted, and it is clear and notorious that ſhe is married, ſhe ſhall be diſcharged on filing common bail, *Anonymous*, 105
7. But if the coverture be not clearly made out, the Court will put her to plead it in abatement, *Milner v. Mills*, 105 *note*
8. An action of falſe impriſonment of the wife, brought by huſband and wife, declaring, *per quod* the huſband's domeſtic

meſtic concerns; remained undone, *ad damnum* of both, is good; for the *per quod* is only introduced by way of aggravating the damages, *Ruſſell v. Corn*, 127

9. If a wife, after parting from her huſband by conſent, and receiving a ſeparate maintenance, commit adultery, her huſband ſhall not be liable to her debts, *Cragg v. Bowman*, 147

10. An action by huſband and wife for a battery on both, concluding *ad damnum ipſorum*, is bad, *Cole v. Turner*, 149

11. If huſband and wife live together in the ſame houſe, the huſband is liable for debts contracted by the wife in the character of a *ſeparate trader*, *Langford v. Tyler*, 162

12. A huſband is liable for neceſſaries furniſhed to his wife during her cohabitation with him; ſo if he turns her out of doors; or if he receive her back after ſeparation; but if ſhe leave him, and live ſeparate, and the perſon has notice of the ſeparation, the huſband is not liable.—*Sed quære*, unleſs the wife have a ſeparate maintenance, *Robiſon v. Goſnold*, 171

13. A married woman may give *coverture* in evidence under the general iſſue, *Anonymous*, 230

14. The wife of a popiſh recuſant cannot be executrix to her huſband, *Ride v. Ride*, 239

15. Covenant lies againſt huſband and wife upon a demiſe to her *dum ſola*, &c. *Anonymous*, 239

16. If huſband and wife come into court to acknowledge a deed, the acknowledgement of the huſband only need be entered on the record, *Anonymous*, 263

17. If a wife be arreſted by a wrong name, ſhe may plead the *miſnomer* after ſhe has given a bail-bond in that name, *Linch v. Hook*, 311

HYPOTHECATION.

1. A captain may *hypothecate* his ſhip during the voyage for whatever may be neceſſary to relieve her from diſtreſs, and enable her to perform the voyage, *Trantor v. Watſon*, 12

2. But it ſeems doubtful, whether *the cargo* of a ſhip may be hypothecated; and yet, as an *hypothecation* is conſidered as a means of *ſalvage*, and it is certain that the captain may throw goods overboard to preſerve the remainder of the cargo, it ſeems that the cargo, if neceſſary, may be pledged for the *redemption* of the ſhip, *Trantor v. Watſon*, 13

3. The court of admiralty has juriſdiction in the caſe of an *hypothecation-bond* given by the maſter of a ſhip for neceſſaries occaſioned by a diſtreſs *at ſea*, although the contract was made *on land*, *Johnſon v. Shepney*, 79

I.

JAMAICA.

Debt for rent lies, by *a leſſor* againſt *a leſſee*, in the courts at *Weſtminſter*, on a demiſe of lands in *Jamaica*, *Wey v. Yally*, 194

JEOFAILE.

1. An *immaterial iſſue* is helped, after verdict, by the ſtatute of *Jeofails*, *Staple v. Heydon*, 10

2. The queſtion whether the ſtatutes of *Jeofails* and *Amendments* extend to pleas of the crown, conſidered, *Reg. v. Tutchin*, 269

3. The ſtatutes of *Jeofails* explained, 4, 5. 285, 286

IMPARLANCE.

1. The Court may grant imparlance as often as ſhall be neceſſary for the ends of juſtice, 183

2. If a perſon be bound to appear in the court of king's bench on the firſt day of a Term, to anſwer all matters alledged againſt him, and the atrorney-general file an information againſt him the ſame day, he is intitled to an *imparlance* until the enſuing Term, *Reg. v. Rawlins*, 243

IMPOSSIBLE DAY.

If it appear in a conviction on a penal ſtatute, that the defendant was ſummoned on an impoſſible day, it is erroneous, *Reg. v. Dyer*, 41

INDICTMENT.

1. An indictment againſt a *common ſcold*, uſing the words "*communis calumniatrix*" inſtead of "*communis rixatrix*," is erroneous; for *rixatrix* is a word of art, and muſt be uſed in deſcribing the offence in an indictment againſt *a ſcold*, *Reg. v. Foxby*, 11

2. A clerk in court may confeſs an indictment for his client, 17

3. Where a ſtatute takes notice of a common law offence, and adds a further penalty, an indictment thereon may well conclude *contra formam ſtatuti*, *Reg. v. Bethell*, 17

4. On an indictment for falſely arreſting a man by a certain warrant, and thereby extorting divers ſums of money, "he the defendant well knowing the "ſaid warrant to be forged, &c." *Quære*, Whether the allegation of the forgery ſhall be taken as a *deſcription* of the offence, or an *aggravation* of it only, *Reg. v. Tracy*, 31

5. An indictment for procuring a juſtice of the peace to refuſe bail muſt alledge that the bail was *offered* and *refuſed*, *Reg. v. Tracy*, *ib.*

6. An indictment for procuring a perſon to be falſely committed muſt ſet forth an actual commitment, *Reg. v. Tracy*, *ib.*

7. An indictment for extortion muſt alledge the preciſe ſums of money that were extorted, *Reg. v. Tracy*, *ib.*

8. An indictment for a *treſpaſs* is good, although ſome parts of the charge repreſent the defendant as an *acceſſary* and not as a *principal*, for the ſame facts that in *felony* make a man an *acceſſary*, make him a *principal* in *treſpaſs* and in *treaſon*, *Reg. v. Tracy*, *ib.*

9. An indictment ſtating that the defendant, fraudulently conſpiring to cheat *I. S.* of his money, got him to lay a certain ſum of money upon a *foot race*, and prevailed with the party to run booty, is good, *Reg. v. Abel*, 42

10. After a peremptory rule to plead to an indictment, it ſhall be tried the ſame Term, *ib.*

11. An indictment on the ſtatute 5. Eliz. c. 4. for exerciſing "the art, myſtery, "or occupation of *taylor*," not having ſerved an apprenticeſhip thereto, is bad, 43

12. If a civil action, as *trover*, be brought, and it appear that the goods were feloniouſly taken, an indictment will lie againſt the defendant, although the plaintiff recover in the action, *Luttrell's Caſe*, 77

13. An indictment, alledging perjury in the time of *George the Second*, and concluding *contra pacem* of *George the Third*, is erroneous, *Reg. v. Lookup*, 80 *notis*

14. An indictment will not lie for ſelling ale and beer without a licence, *Anonymous*, 87

15. On an indictment for diſobeying an order of juſtices, the authority of the juſtices to make ſuch order may be enquired into, *Reg. v. Glin*, 87

16. An indictment for forging A COCKET for five *packs of linen cloth* is ſufficiently certain, *Reg. v. Browne*, 87

17. An indictment will not lie againſt *a wife* for poiſoning her huſband's cows, *Anonymous*, 88

18. If a man be made an officer by act of parliament, or be otherwiſe appointed a public officer, he is indictable at common law, for miſbehaviour in his office, *Anonymous*, 96

19. An indictment of *forcible entry* is good, although it omit the words *manu forti*, *Reg. v. Dyer*, *ib.*

20. An indictment will not lie againſt a man for enticing an apprentice to leave his maſter's ſervice; for it is of a private nature and to the prejudice of a ſingle perſon only: the remedy is by action on the caſe: but to perſuade a ſervant or apprentice to embezzle his maſter's goods, is an indictable offence, *Reg. v. Daniel*, 99. 182

21. An

21. An indictment for perſuading a ſervant to purloin his maſter's goods muſt lay a *venue* in the place where the perſuaſion was uſed, *Reg. v. Daniel*, 101

22. An indictment charging that *A.* deceitfully went to *B.* as ſent from *C.* (to whom *B.* owed money) to call for and receive the money, *ubi revera C.* did never ſend him, will not lie at common law, although *A.* by this means in fact obtained the money, *Anonymous*, 105

23. But by 33. Hen. 8. c. 1. and 30. Geo. 2. c. 24. to obtain money or goods by means of *a falſe token* or *falſe pretence* is now indictable, 205 *notis*

24. After indictment found, a plea cannot be received at the crown office, unleſs the defendant enter into a recognizance to try it at his own charges, *Reg. v. Tracy*, 115

25. If there be an outlawry upon an indictment, and the outlawry is reverſed, the indictment ſtands good, *Morgan v. Tomkins*, *ib.*

26. But if judgment be upon an indictment by *nil dicit* or any other judgment by the Court, and that be reverſed, all is ſet at large, and there is an end of the indictment, *Morgan v. Tomkins*, *ib.*

27. It is not an indictable offence to ſpeak *unmannerly words* of the mayor of a corporation or the juſtices of a county, but the offender may be bound to *good behaviour*, *Reg. v. Langley*, 125

28. An indictment on the 5. Eliz. c. 4. muſt be laid *contra pacem*, for its being *contra formam ſtatuti* is not ſufficient, *Reg. v. Lane*, 128

29. An indictment for conſpiring falſely to charge another with being the father of a baſtard child, is good, although it do not aver that the defendant was not the father; for it is the conſpiracy which forms the material part of the offence, *Reg. v. Beſt*, 137

30. An indictment will lie for a conſpiracy before acquittal, but not an action on the caſe, *Reg. v. Beſt*, 138

31. An indictment for diſobeying an order of juſtices, in not receiving and providing for a pariſh apprentice, ought not to be laid *vi et armis*, *Reg. v. Gold*, 164

32. If an indictment of perjury in reciting the record of the trial, ſtate a fact as happening between *A. B.* and *C.* and it appear from the record produced in evidence, that the fact happened between *A.* and *B.* only, the variance is fatal, *Reg. v. Carter*, 168

33. An acquittal, if it be from a defect in the indictment, cannot be pleaded in bar to a ſecond indictment for the ſame offence, *Reg. v. Carter*, *ib.*

34. An indictment lies for tearing an account after it is ſigned and ſettled, *Reg. v. Crijp*, 175

35. An indictment will not lie for a *bare treſpaſs*; for inſerting the words *vi et armis* is not ſufficient; but there muſt be ſuch an actual force as implies a *breach of the peace*, to make a *treſpaſs* an indictable offence; and this degree of actual force muſt appear on the face of the indictment, 175 *notis*

36. The manner of bringing a writ of error upon an indictment, and the mode of proceeding thereon deſcribed, *Reg. v. Foxby*, 178

37. If an indictment for a conſpiracy againſt ſeveral, charge the acts of ſome of the defendants in the pariſh of *St. Giles* in *Middleſex*, and of the others in the pariſh of *St. Margaret's*, in the ſame county, and a *venue* be awarded to *St. Giles* only, it will be a *miſ-trial*, for the jury ought to come from both pariſhes, *Reg. v. Tracy*, 179

38. If a perſon procure another to be arreſted, and maliciouſly perſuade the juſtice to refuſe him bail, and the gaoler to extort money from him for fees, it is an indictable offence, although the original arreſt was by virtue of a legal warrant, *Reg. v. Tracy*, *ib.*

39. An indictment for perſuading *A.* to commit *B.* is good, without ſaying, he was *thereupon* committed, *Reg. v. Tracy*, *ib.*

40. The caption of an indictment is good, although it is not said "*for* the body of the county," *Reg. v. Cotesworth*, 180

41. An indictment for procuring a servant to leave his master must aver that he did leave him, *Reg. v. Daniel*, 182

42. An indictment against a servant for absenting himself from his master's service must state how long the absence continued, *Reg. v. Daniel*, *ib.*

43. An indictment lies for fishing in another's private pond, and carrying away so many *carps*, the *goods and chattels* of the prosecutor, *Reg. v. Steer*, 183

44. To set up a market, a fair, or a leet, is an indictable offence, *Anonymous*, 184

45. An indictment for conspiring to charge a man with being the reputed father of a *bastard child*, need not aver that the person charged was not the father, *Reg. v. Best*, 185

46. An illegal conspiracy is indictable, though nothing be done in pursuance of it, *Reg. v. Best*, 185

47. Keeping open shop on a fast-day is an indictable offence, but each offender must be separately indicted, *Anonymous*, 210

48. An indictment against several for a *misdemeanor* may be laid against some of the defendants only, on the others entering into a rule to plead *guilty*, if their co-defendants are convicted, *Reg. v. Middlemore*, 212

49. An indictment on 5. Eliz. c. 4. will lie at a borough sessions, *Reg. v. Franklin*, 220

50. A defendant who removes an indictment by *certiorari*, must appear during the Term in which the writ is returned, *Anonymous*, 221

51. An indictment will not lie at common law against a *hawker and pedlar* for being *a vagrant*, *Reg. v. Branworth*, 240

52. If an indictment be removed by *certiorari* out of *London* or *Middlesex*, the defendant must enter into a recognizance to try it the same Term or at the Sittings after, but if removed out of any other county, he is without day; and if he do not appear, process shall issue until he is outlawed; but if *the defendant* remove an indictment, he must enter into a recognizance pursuant to the 5. Will. & Mary, c. 2. *Reg. v. Bowles*, 245

53. In indictments and informations, neither the prosecutor nor the defendant can pray *a tales* without a warrant from the attorney-general, *Reg. v. Bowles*, *ib.*

54. An indictment for not repairing "a "*common bridge* situated in a certain "common *foot-path*," is good, without stating that it was in the *king's highway*, *Reg. v. Saintiff*, 255

55. The process on indictments originally commenced in the court of king's bench must be returnable on a *day certain*, but if removed from an inferior court, on a *common day*, *Reg. v. Tutchin*, 268

56. To persuade an apprentice to embezzle his master's goods, is an indictable offence, but the indictment must positively aver that he did take away the goods in consequence of such persuasion, *Reg. v. Collingwood*, 288

57. If two men, under the false pretence of being, the one *a broker*, the other *a wine merchant*, exchange a liquor which they affirm to be *New Lisbon wine* with a hatter for *hats*, whereas in truth the liquor was to their knowledge only a mixture of *stale beer and vinegar*, it is an indictable offence, *Reg. v. Macarty*, 302

58. Precedent of the indictment for the above offence, 301

59. If a collector of public taxes assess and rate some persons too high, and omit to tax others, and yet levy the tax upon them, and put the money into his own pocket, it is an indictable offence, *Reg. v. Birch*, 306

60. An indictment for not repairing a county bridge, may, on suggesting that

that the whole county is interested, he tried in the next adjoining county, *Reg. v. Wills*, 307

51. An indictment, that *A.* being a *common cheat*, went to the wife of *B.* and obtained certain ſums of money from her on pretence that he had ſold part of a ſhip to him, is too general, *Reg. v. Hanson*, 311

INFORMATION.

1. An information on the ſtatute 4. & 5. Will. & Mary, c. 11. for killing game, muſt ſhew that the defendant is not qualified, *Reg. v. George*, 40

2. If a perſon ſurrender to an information for a miſdemeanor, he may, on renewing his recognizance, have *time to plead*; but if he is brought in on a *capias*, he muſt plead *inſtanter*, *Reg. v. Tutchin*, 165

3. If a perſon be bound to appear in the court of king's bench on the firſt day of a Term, to anſwer all matters alledged againſt him, and the attorney-general file an information againſt him on the ſame day, he ſhall have an *imparlance* until the enſuing Term, *Reg. v. Rawlins*, 243

4. In an INFORMATION *ex officio*, or other proceeding originally commenced in the court of king's bench, the *venire*, *diſtringas*, and other *proceſs*, though ſued out into a different county than that in which the court ſits, muſt be returnable at a *day certain*; but in INDICTMENTS or other proceedings commenced in other courts, and removed into the king's bench by *certiorari*, the proceſs muſt be returnable on a *common day*, *Reg. v. Tutchin*, 268

5. In an information filed *ex officio*, if the *venire facias* be returnable on *Monday* after three weeks of *St. Michael*, and the *diſtringas* awarded on the roll with a *niſi prius* on *Saturday* after the morrow of *All Souls*, but the *diſtringas* through miſtake be *teſted* the day after the return of *the venire facias*, it is a *diſcontinuance of proceſs*; but although, being a criminal caſe, it is not within the *ſtatutes of Jeofails*, yet it may, after verdict, be amended at common law, *Reg. v. Tutchin*, 269

INFORMER.

When a ſtatute gives a penalty to *the king* and to *the informer*, and the informer does not ſue within the year, the king may ſue for the whole penalty at any time within *two years*, *Reg. v. Franklin*, 220

INJUNCTION.

If an attorney and other perſons combine to deliver a declaration in ejectment to a perſon planted on the premiſes for the purpoſe of falſely repreſenting the *tenant in poſſeſſion*, and by an affidavit of ſuch ſervice obtain judgment againſt *the caſual ejector*, and ſo get into fraudulent poſſeſſion, the Court will grant a rule for the parties to ſhew cauſe why an attachment ſhould not iſſue; but they will not make it part of the rule that they ſhall not move for an *injunction* in chancery, *Holderſtaffe v. Saunders*, 16

INNKEEPER.

An action brought againſt an *innkeeper* for not ſafely keeping a gelding, 223

INQUISITION.

1. An inquiſition of forcible entry into a copyhold eſtate muſt alledge that it was demiſed and demiſable at the will of the lord, *Cooper's Caſe*, 90

2. The caption of an inquiſition of forcible entry upon the ſtatute 3. Hen. 6. c. 9. ſtating it to be by "*jurors ſworn and charged upon their oath, &c.*" is good, although the words "*to inquire for the body of the county*," be omitted, *Reg. v. Watton*, 95

3. If a traverſe be tendered to an inquiſition of forcible entry, reſtitution ſhall not be granted, *Anonymous* 15

4. An inquiſition for a riot need not ſpecially purſue the words of the ſtatute 13 Hen.

13. Hen. 4. c. 7. but may conclude generally *contra formam ſtatuti, Reg. v. Pugh.* 140

INQUIRY.

1. On a *writ of inquiry* of damages, the defendant has no *day in bank*; but the plaintiff has a day by the practice of king's bench, *Staple v. Heydon,* 6

2. A writ of inquiry cannot be quaſhed until it be returned and filed, but before the return it may be ſuperſeded, *quia improvidè emanavit, Anonymous,* 40

3. An exception cannot be taken to *a juror* on a writ of inquiry, 43

4. A *writ of inquiry* may be executed on the day it is made returnable, *Brough v. Perkins,* 81

5. Convenient notice muſt be given of executing an inquiry, *William v. Jackſon,* 146

6. Where a Term's notice of trial is neceſſary, there muſt, at the ſame diſtance of time, be the like notice of executing a writ of inquiry, *Payton v. Burdus,* 146 *notis*

7. A writ of inquiry returnable on a *Sunday* is void, *Harvey v. Broad,* 148

8. If a writ of inquiry be returnable *tres Trinitatis,* and the return-day happen to be *Sunday,* it is bad, and cannot be executed on the *Monday*; and the Court will take notice of it, although it is not aſſigned for error on the record, *Harvey v. Broad,* 196

9. Same point, *Davy v. Salter,* 251

10. A miſpriſion of the clerk in a writ of inquiry in the court of common pleas may be amended in the court of king's bench, *Michel v. Waldron,* 306

INTEREST.

1. A bill of exchange bears intereſt from the time it is demanded in payment, *Anonymous,* 138

2. In debt on a ſingle bill, the jury may give the amount of the intereſt due upon it, in their eſtimation of the damages, *Oſborne v. Hoſier,* 167

3. If a bond be for 400l. conditioned to pay 200l. at ſuch a day without mention of intereſt, and the bond be not paid, it ſhall bear intereſt, *Anonymous,* 184

ISSUE.

1. In treſpaſs for throwing down rails and entering a wharf, if the defendant plead that *A.* was poſſeſſed of the wharf under a leaſe then unexpired, and had *a way* from thence over the *locus in quo,* and underlet the ſame to the defendant, with all ways, &c. neceſſary to the enjoying of the ſame, and that he the defendant had no other way to the *terminus ad quem,* the allegation "that the defendant had *no other way, &c.*" is *ſurpluſage,* and an iſſue taken thereon is an *immaterial iſſue, Staple v. Heydon,* 1

2. If an immaterial iſſue be joined, the Court may award *a repleader, Staple v. Heydon,* 3

JUDGMENT.

1. Judgment in awarding a repleader is general "*quòd partes replacitent,*" without any ſpecial direction from what point of the pleading the repleading ſhall commence, *Staple v. Heydon,* 3

2. In an action of debt, if the defendant plead *in abatement* of the writ, and, on an imparlance, the plaintiff make default by not appearing at the *dies datus,* final judgment ſhall be given on the default, *Staple v. Heydon,* 5

3. So in debt on bond, if the defendant plead *a releaſe,* and, after demurrer, a default be made, final judgment ſhall be given, *ib.*

4. If two ſeveral treſpaſſes be alledged in a declaration, and the defendant plead a bad plea to one of them, and a good plea to the other, and the plaintiff demurs to the bad plea, and joins iſſue on the good one, and then the defendant makes default at the day of *niſi prius,* on which a writ of inquiry is iſſued, and contingent damages aſſeſſed on the demurrer; *quære,* Whether

Whether judgment ſhall be given upon the *demurrer* or upon the *default? Staple v. Heydon*, 5

5. If the party come in upon proceſs in a perſonal action, or upon a *cepi corpus*, or upon *the exigent*, and a day is given by conſent, no judgment can be given on a default made at ſuch day; but if ſuch a default be made after a declaration delivered, it is peremptory, and final judgment ſhall be given, by HOLT, *Chief Juſtice*, *Staple v. Heydon*, 8

6. Judgment may be given againſt a man, although it appear upon the proceedings that he is out of court; but it cannot in ſuch caſe be given for him, by HOLT, *Chief Juſtice*, 10

7. If a defendant *confeſs* a treſpaſs, and *avoid* it by pleading matter in juſtification, which, if well pleaded in form, would have been a good bar to the action, judgment ſhall not be given againſt him on the *confeſſion*, *Staple v. Heydon*, *ib.*

8. But on the contrary, as where, in an action of ſlander for calling the plaintiff "*a thief*," the defendant in juſtification ſays that the plaintiff "*received a thief*," and pleads it, judgment ſhall be given on the *confeſſion*; for the *receiving of a thief* could not, if well pleaded, have juſtified the calling him "*a thief*," and ſo could not bar the action, *ib.*

9. In treſpaſs againſt two for taking a gun, if one juſtify the taking in his own defence, and the other plead "*not guilty*," and is found *guilty*, and the other iſſue is found for the defendant, judgment may be given upon the verdict on the general iſſue; for the verdict on the *ſpecial iſſue*, though found againſt the plaintiff, does not totally deſtroy his action, *Marlar v. Ayloffe*, *cited* *ib.*

10. But in treſpaſs againſt two for taking goods, if one plead the general iſſue, and is found guilty, and the other juſtify the taking by gift, and this ſpecial plea is found to be true, judgment cannot be given on the verdict againſt the defendant who pleaded the general iſſue, becauſe the verdict on the other defendant's ſpecial plea totally deſtroyed the plaintiff's action, *Staple v. Heydon*, 10

11. On a demurrer to a juſtification in treſpaſs and conditional damages taken, if entire damages be aſſeſſed, and any of the treſpaſſes are ill laid, the judgment ſhall be arreſted as to the whole, *Joſe v. Mills*, 14

12. If a declaration be delivered of *Hilary Term*, and rules of pleading given, and the defendant do not plead before the *eſſoin-day* of *Eaſter Term*, the plaintiff may ſign judgment for want of a plea; but if the plaintiff in that caſe has not given rules in *Hilary Term*, he muſt give them in *Eaſter Term*, before he can ſign judgment, *Anonymous*, 22

13. If an attorney undertake to appear, and accept a declaration *de bene eſſe*, the plaintiff, on the attorney's refuſing to appear, cannot ſign judgment for want of a plea, *Wigg v. Rook*, 86

14. If *a releaſe* be pleaded, and the plaintiff crave *oyer* of it, and the defendant will not grant it, the plaintiff may ſign judgment for want of a plea, *Anonymous*, 123

15. If a plaintiff recover againſt an adminiſtrator, and die, his executor may maintain debt on the judgment, upon a ſuggeſtion of a *devaſtavit* by the defendant in the life-time of the teſtator, *Berwick v. Andrews*, 126

16. Judgment ſhall be arreſted, if words not actionable are joined with words that are actionable, and entire damages given, *Graves v. Blanchett*, 148

17. Judgment in *ſcire facias* againſt bail, that the plaintiff "do recover his "*damages* ſuſtained by occaſion of the "delay of execution," is erroneous; for the Court cannot award *damages*, but only *coſts of ſuit*, *Fanſhawe v. Morriſon*, 157

18. If judgment be given in any Term, it may be entered upon the roll as of the ſame Term in which it was given at any time after, *Hodges v. Templar*, 191

19. In

19. In what cases judgment ſhall or ſhall not be given when the Judges of the court are equally divided in opinion, *Walmſley v. Ruſſell*, 203, 204

20. After a rule to ſign judgment, there ought to be *four days* excluſive of the day on which the rule is made, and the judgment ſigned, *Reignots v. Tipping*, 241

21. In debt on a judgment for damages and coſts above ten pounds, the defendant may be held to ſpecial bail, although the original action was for a ſum under ten pounds, *Lewis v. Pettle*, 268 *notis*

22. If judgment be ſigned under an agreement to ſtay execution for a year, execution may, after the year, be taken out without a *ſcire facias*, but not if the ſtay be only for three months, and the execution hindered by injunction, *Booth v. Booth*, 288

JOINT-TENANT.

1. The poſſeſſion of one joint-tenant is the poſſeſſion of another, *Ford v. Grey*, 44

2. If there be two joint-tenants in fee, and one of them levy a fine of the whole, this does not amount to an *enter* of his companion, but it is a ſeverance of the jointure, although he be in of the old uſe again, *Ford v. Grey*, 45

ISSUE.

1. In treſpaſs for making replevin after notice of a claim of property, the notice only is in iſſue, *Leonard v. Stacey*, 63

2. *Levancy et couchancy* may be tried in an iſſue, 115

JURISDICTION.

1. In all pleas that ouſt a court of juriſdiction, whether ſuperior or inferior, there muſt be an oath in that very court of the truth of the plea, *Sparks v. Wood*, 146

2. In an action on the caſe in an inferior court for negligently keeping the plaintiff's horſe, whereby he was taken out of the defendant's ſtable, and immoderately rode, it is not neceſſary to aver that the immoderate riding was within the juriſdiction, for the breach of the contract is the *gift* of the action, *Stanyon v. Dacre*, 224

3. But in an *aſſumpſit* in an inferior court for money had and received, the declaration muſt not only allledge that the defendant *promiſed to pay*, but that the money was *had and received* within *the juriſdiction* of the court, *Trevor v. Wall*, 224 *notis*

JURY.

A juror cannot be excepted to on a writ of enquiry, 43

JUSTICES.

1. Juſtices of the peace cannot delegate their authority; and therefore an indictment for not producing pariſh-books of rates before certain juſtices appointed by the reſt to examine and make order thereon, will not lie, *Reg. v. Glin*, 87

2. An order of filiation made on the examination of *one juſtice* is bad, although *two juſtices* make the adjudication; for the examination is a *judicial act*, and both muſt be preſent, *Reg. v. Weſt*, 180

3. Inſtances in which the concurrence of two juſtices is neceſſary, 180 *notis*

JUSTIFICATION.

A ſpecial juſtification muſt be of matter of *fact*, and not of *record*, *Anonymous*, 40

K.

KNIGHT.

1. A plea in abatement that the plaintiff had received the order of *knighthood* is good, *Lutt v. Mills*, 106

2. The word "*miles*" means a *knight batchelor*, *ib.*

L.

LABOURERS.

Whether the ſtatute of Labourers extends to garden-work, 204

LANDLORD AND TENANT.

1. If a houſe originally entire be divided into ſeveral apartments, with an outer door to each apartment, and no communication with each other, the ſeveral apartments ſhall be rated as diſtinct manſion-houſes; but if the owner live therein, all the untenanted apartments ſhall be conſidered as parts of his houſe, *Tracy v. Talbot*, 214

2. In what caſe *warning* is neceſſary to be given by a landlord to his tenant, *Dod v. Monger*, 215

3. If a landlord make a diſtreſs for rent, he muſt remove the goods within the time mentioned in the ſtatute, *Dod v. Monger*, 216

4. By 11. Geo. 2. c. 19. a landlord, after making a diſtreſs for rent, ſhall not be conſidered as a treſpaſſer *ab initio* for any ſubſequent irregularity; but the diſtreſs ſhall be good, and the party recover damages for the ſpecial injury he receives, 216 *notis*

5. If a perſon pretending to have title to land give ſecurity to the tenants to ſave them harmleſs upon paying him the rent, and afterwards another recover in ejectment againſt them, they have no remedy upon the ſecurity until recovery of meſne profits, *Anonymous*, 222

6. The king cannot be a tenant at will, 248

LEASES.

1. Before the 8. and 9. Will. 3. c. 27. and 27. Geo. 2. c. 17. a leaſe of the office of the marſhal of the priſon of the court of king's bench for a certain number of years, determinable on the death of the leſſee, was good, *Sutton's Caſe*, 57

2. If a biſhop make a leaſe for twenty-one years, and the leſſee create *a truſt* thereupon, and on the death of the leſſor his ſucceſſor voluntarily renews the leaſe, equity will ſubject the ſecond leaſe to the former truſt, *Memorandum*, *ib.*

LEATHER.

What ſhall be conſidered leather, 165

LEVANT ET COUCHANT.

1. A preſcription for common for cattle *levant et couchant* on *a cottage* is good, *Emerton v. Selby*, 115

2. "*Levancy et couchancy*" may be tried in an iſſue; and the proof that cattle were foddered in the homeſtall is ſufficient, *ib.*

LIBERUM TENEMENTUM.

In what caſe the defendant may plead *liberum tenementum* to an action of treſpaſs, *Elwis v. Lamb*, 117

LICENCE.

1. If the law give a man *a licence* for the doing a thing, and an action of treſpaſs is brought, the licence muſt be ſpecially pleaded, for it cannot be given in evidence on the general iſſue, *Everard v. Stacey*, 69

2. Therefore if a maſter bring an action of covenant againſt his apprentice for leaving his ſervice at ſuch a time, and the apprentice left the ſervice with his maſter's leave, this licence muſt be pleaded by way of juſtification, *Anonymous*, 70

3. And the maſter in ſuch plea cannot give in evidence a leaving of him at another time than that which is ſtated in the declaration, *ib.*

4. If *A.* licenſe *B.* to put trees planted in boxes into his garden, and *A.* afterwards ſell the garden with all his trees thereon, and the vendee ſuffers the trees to continue without moleſtation or objection, this is a renewal of the licence granted by *A. Oliver v. Vernon*, 171

LIMITATIONS.

1. By 4. Ann. c. 16. ſ. 17. "All ſuits "and actions in the court of admi- "ralty for ſeamen's wages ſhall be "commenced within ſix years next "after the cauſe of action ariſes; but "if the party be a minor or *feme* "*covert*, inſane, impriſoned, or be- "yond ſeas, it ſhall be within ſix "years next after attaining age, be- "ing diſcovert, of ſane memory, re- "leaſed, or returning from ſea," 26 *notis*

2. This ſtatute as it bars a right ſhall be ſtrictly conſtrued, 26

3. But although the court of admiralty refuſes to receive the plea of the ſtatute of Limitations to a ſuit for ſeamen's wages, yet if the plea be badly pleaded, they ſhall not be *prohibited* from proceeding in the ſuit, *Ewer v. Jones*, *ib.*

4. And if a man be beyond ſea at the time the debt accrues, he may plead it by way of replication to the defendant's bar of the ſtatute, *Ewer v. Jones*, *ib.*

5. Seamen's wages ariſe from the time *the ſervice* is performed, and not from the time *the contract* is made; and therefore though the contract be above ſix years, if any part of *the ſervice* be within ſix years, it is out of the ſtatute, *Ewer v. Jones*, *ib.*

6. A new promiſe to pay an old debt, made after the arreſt, and before the filing of the bill, did not formerly avoid the ſtatute of Limitations, *Dean v. Crane*, 310

7. But now the acknowledgment of a debt after the action is commenced will avoid the ſtatute, *Yea v. Fouraker*, 310 *notis*

8. Inſtances of the kinds of acknowledgement which will avoid the ſtatute, *Dean v. Carter*, 310 *notis*

LONDON.

1. *Quære*, whether being free of the *Waterman's Company* makes a man a freeman of *London*, *Barbir v. Dennis*, 69

2. On an eſcape out of either of THE COMPTERS of the city of *London*, the action muſt be in the name of both the ſheriffs, *Anonymous*, 96

3. There is a good bye-law in the city of *London*, that no foreigner ſhall weigh goods imported except at the ancient beam of that city, *Cudden v. Proveſt*, 123

4. The court of king's bench will not enter into the validity of a bye-law upon the return of a *habeas corpus*, except it be a bye-law of the *city of London*, *Cudden v. Proveſt*, *ib.*

5. A bye-law of the city of *London*, inflicting a penalty on any perſon who ſhall employ *a porter* not a freeman of the *Porters' Company*, is void; but a bye-law that none but a freeman ſhall do porterage work is good, *Cudden v. Eſtwick*, *ib.*

6. The gaol delivery of *Middleſex* is held by preſcription in the city of *London*, *Anonymous*, 145

7. On a return to a *habeas corpus*, grounded on a *cuſtom of London*, the Court will firſt order the return to be filed, for the purpoſe of controverting the cuſtom in an action for a falſe return, *Fazakerley v. Baldoe*, 177

8. A *procedendo* may be granted to the mayor's court in *London* after the return of a *habeas corpus* (brought by a perſon committed for non-payment of a penalty under a bye-law of the city), has been *filed* in the ſuperior court, although the uſual practice is to award the *procedendo* without filing the writ, *Fazakerley v. Baldoe*, *ib.*

9. The Court will not enter into the validity of a bye-law upon a return to a *habeas corpus*, except in the caſe of the city of *London*, *Ballard v. Bennett*, 178 *notis*

M.

1. A *mandamus* will not lie to reſtore a perſon to the place of clerk of a company in a corporation, although it be

be an office inſtituted by the charter, for it is of a private nature; and although the clerk has a freehold in ſuch office, the perſon may have *an aſſize*, or an action on the caſe, *White's Caſe*, 18

2. But a *mandamus* will lie to reſtore *an attorney* to his office of attorney in an inferior court, for the office of attorney is neceſſary to the adminiſtration of juſtice, and is of a public concern, *White's Caſe*, *ib.*

3. An *alias mandamus* may be made returnable *immediatè*, and for a contempt thereon the Court will grant *an attachment*, or they may make the firſt writ returnable *de die in diem*, or of a ſhort return as a week, and an *alias* in four days after, and *a pluries* with the like ſhort return, *Reg. v. Mayor of Thetford*, 25

4. A *mandamus* will not lie to "The "Gunmakers' Company" to reſtore a member to the office of "Approver "of Guns," *Vaughan v. Gunmakers*, 82

5. A *mandamus* will not lie to compel a conſtable to pay money levied by him under a diſtreſs and ſale, after having reſcinded the ſale, under an idea of its having been erroneous, and reſtored the money to the purchaſer, and the goods to the owner, *Morley v. Stacker*, 83

6. A *mandamus* lies to the ſpiritual court to ſwear in churchwardens; and it cannot be returned that they were *not duly elected*; but if there is matter of doubt a *ſpecial return* may be made, *Reg. v. Guy*, 89

7. A *mandamus* does not lie to overſeers to make a rate to reimburſe their predeceſſors in monies expended for the relief of the poor; but if an overſeer advance his own money to the uſe of the poor of the pariſh, he may, during his continuance in office, get a rate for the relief of the poor, and reimburſe himſelf out of the monies ariſing from it; and a *mandamus* will lie to compel the juſtices to ſign and allow ſuch a rate, *Reg. v. Pariſh of Littleport*, 97

8. The ex-bailiff of a town ſhall make a return to a *mandamus*, *Reg. v. Clitheroe*, 133

9. A *mandamus* may be amended before return made, *Reg. v. Clitheroe*, *ib.*

10. A *mandamus* lies to compel juſtices of the peace to make enquiry of the fact of forcible entry, *Anonymous*, 138

11. A copy from the crown-office of the writ and return to a *mandamus* is ſufficient evidence againſt the party, on an information for a falſe return, *Reg. v. Chapman*, 152

12. On a *mandamus* being granted to a corporation to elect *a town-clerk*, the writ ought to be delivered to THE MAYOR, *Reg. v. Chapman*, 152

13. A return to a *mandamus* to elect a town-clerk, that the candidates had an equal number of votes, is bad, *Reg. v. Chapman*, *ib.*

14. A *mandamus* granted jointly and ſeverally to all the juſtices of a town, to enquire of a forcible entry, on proof having been made that they had all refuſed to take any inquiſition on the ſubject, *Caly v. Hardy*, 164

15. A *mandamus* will not lie to *juſtices of the peace*, commanding them to ſuffer a diſſenting miniſter quietly to preach in a particular meeting-houſe, *Peat's Caſe*, 229

16. A *mandamus* does not lie to juſtices at ſeſſions, commanding them to ſtate a ſpecial caſe, *Peat's Caſe*, *ib.*

17. An argumentative return to a *mandamus* is bad, *Reg. v. Mayor of Hereford*, 309

18. A *mandamus* lies to juſtices of the peace to admit a diſſenting miniſter to take the oath of allegiance, and ſubſcribe the declaration according to the toleration act, in order to qualify himſelf to preach, *Peat's Caſe*, 310

19. To obtain a *mandamus* to admit, the party ought to ſuggeſt whatever is neceſſary to intitle him to be admitted; and if that be not done, or if it be done, and the fact is falſe, that will be a good matter to return, *Peat's Caſe*, *ib.*

MA-

MALICIOUS PROSECUTION.

1. An action for a malicious profecution will not lie, if there was a *probable cauſe* of profecution; for to ſupport ſuch an action, there muſt be *direct malice*, and without any colour of cauſe, *Anonymous*. 25

2. An action for a malicious profecution will not lie, if there was *probable cauſe* for the profecution, *Anonymous*, 73

3. An action for a malicious profecution will not lie for bringing a *civil action*, although the plaintiff has no grounds for it, *Savil v. Roberts*, 73 *notis*

4. An action for a malicious profecution will lie for *holding to bail* for a greater ſum than is due, *Daw v. Swain*, 73 *notis*

5. An action for a malicious profecution will lie for ſuing in a good cauſe of action in a court that has not original juriſdiction, *Atwood v. Monger*, 73 *notis*

6. To maintain this action, the plaintiff muſt ſhew both *malice* and want of *probable cauſe*; but malice may be inferred from the want of probable cauſe, *Johnſton v. Sutton*, 73 *notis*

7. Same point, *Johnſton v. Browning*, 216

8. If a declaration for a malicious profecution charge three perſons, one of whom was the juſtice of the peace, with a conſpiracy illegally to arreſt and impriſon the plaintiff, the *conſpiracy* may be collected by the jury from the circumſtances of the caſe; but if it appear that the juſtice of the peace was perſuaded by the others that it was not a bailable offence, and that from *ignorance of the law*, and not from *malice of the heart*, he committed the plaintiff, *he* ought to be found not guilty, *Muriel v. Tracy*, 170

9. If a declaration for a malicious arreſt ſtate the warrant to be "*with intent to* "*rob*," and the charge in the warrant is, "with intent to rob, *as he verily* "*believes*," the variance is immaterial, *Muriel v. Tracy*, 169

10. A declaration for a malicious profecution, ſtating, that the plaintiff was arreſted "by *virtue of a certain* warrant," is good, 170

11. A declaration for a malicious profecution, omitting to ſtate that it was without *probable cauſe*, is bad, *ib.*

12. In an action for a malicious indictment, if the indictment be recited "according to *the ſubſtance* follow-"ing," a variance of "*valoris*" inſtead of "*valentiæ*" is immaterial, *Johnſton v. Browning*, 216

13. In an action for a malicious profecution, the plaintiff ought to prove a copy of the indictment, and that it was found by the grand jury upon the oaths or procurement of the defendants; but the names being on the back of the bill is of itſelf ſufficient evidence that they have ſworn on the bill, *Johnſton v. Browning*, *ib.*

14. Precedent of a declaration in an action on the caſe for maliciouſly indicting the plaintiff for *barratry*, *Goddard v. Smith*, 261

15. A declaration for maliciouſly indicting the plaintiff for barratry without cauſe, ſtating, that he was in due manner thereupon diſcharged, is not maintained by evidence that he was diſcharged by means of a *nolle proſequi* entered by THE ATTORNEY-GENERAL; but if he had pleaded "*not* "*guilty*," and the attorney-general had *confeſſed* the plea, that would have maintained the declaration, *Goddard v. Smith*, 262

MANOR.

1. If a manor be held by the ſervice or tenure of repairing a bridge, and part of it be afterwards ſevered from the manor, yet the charge or ſervice ſhall run with it, and every one of the alienees of ever ſo ſmall a parcel of the demeſnes and ſervices, is anſwerable to the public for the whole charge of the repair, *Reg v. Buccleugh*, 151

2. If a manor be holden by knight ſervice, and the lord alien part of the demeſnes, the alienee ſhall hold by knight ſervice, *ib.*

3. If the lord of a manor grant a rent-charge upon the manor, and alien part of

of the demeſnes, the alienee ſhall hold it ſubject to the charge, 151

4. But the lord of a manor may, on alienation, diſcharge the land from repairs, *ib.*

5. Lands once ſevered from a manor can never become part of the manor again, except by reputation. *ib.*

MARRIAGE.

1. Previous to the Marriage Act, the ſpiritual court was not prohibited from proceeding to diſſolve a marriage contracted *per verba de præſenti*, or *per verba de futuro*; for in both caſes the matter was matrimonial, and within the juriſdiction of the court; nor was it neceſſary to ſhew that a diſſolution of the contract was the object of the ſuit, *Collins v. Jeſſot*, 155

2. But now by 26. Geo. 2. c. 33. ſ. 13. the eccleſiaſtical court cannot compel a celebration of marriage by reaſon of any contract of matrimony *per verba de præſenti*, or *per verba de futuro*, 156 *notis*

3. An action on a promiſe of marriage may be maintained, without proving an expreſs promiſe on the part of the woman, *Hutton v. Manſel*, 172

MARSHAL.

1. The marſhal of the king's bench priſon is, by intendment of law, always preſent in the court of king's bench, *Anonymous*, 16

2. If the marſhal of the king's bench priſon be turned out for non-attendance, and the new-appointed marſhal make a forcible entry into the priſon, and diſpoſſeſs his predeceſſor, the court of king's bench will not, on *motion*, reſtore the poſſeſſion, *Sutton's Caſe*, 91

3. The marſhal is bound to take notice of commitments by the court of king's bench, *Southers' Caſe*, 133

4. If a marſhal ſuffer a priſoner to eſcape, and after he is out of office the party voluntarily ſurrender himſelf, he may be legally detained by the ſucceeding marſhal, *Grant v. Southers*, 183

MARTIAL LAW.

The martial law is not a fixed, but a tranſitory law, variable by THE GENERAL, as occaſion and circumſtances require, according to the *articles of war*; *Anonymous*, 180

MASTER AND SERVANT.

1. If the holder of a bill of exchange ſend his ſervant with it to the payee for payment, and the payee give the ſervant a draft for it on his banker, but the banker, inſtead of paying the ſervant money, gives him a note for the amount, which note is not paid, the act of the ſervant ſhall not bind his maſter, for he was ſent to receive the money, and not the note; and therefore the maſter may recover the amount from the banker, as ſo much money had and received to his uſe, *Ward v. Evans*, 36

2. In what caſe a maſter may bring an action againſt a perſon for ſeducing his ſervant, *Reg. v. Daniel*, 182

3. See alſo *Reg. v. Collingwood*, 288

MERCHANTS.

1. When actions on inland bills of exchange firſt began, 29

2. The difference between foreign and inland bills of exchange, *ib.*

3. Indorſee brought action in the indorſer's name, 30

4. A bill of exchange may be made between two perſons, and how, *ib.*

5. A caſe concerning payment of 60l. to a merchant's ſervant by a bill of exchange, &c. on another who had juſt failed before, 36

6. A merchant's ſervant cannot accept of a bill of exchange, without authority to do it, *ib.*

7. Whether ſuch a bill be payment at all, *ib.*

8. How ſuch notes may be payment, and on whom the proof lies, 37

9. Where a maſter is not bound by ſuch a bill taken, *ib.*

10. *Indebitatus aſſumpſit* by one part-owner of a ſhip againſt another, 264

11. *Indebitatus aſſumpſit* lies not upon a bill of exchange againſt the acceptor, 129

MIDDLESEX.

The gaol-delivery of the county of *Middleſex* is held in the city of *London*, by preſcription; but the commiſſion of *oyer* and *terminer* is executed at *Hicks's Hall*, which is in the county, *Anonymous*, 145

MISDEMEANOR.

1. If a perſon ſurrender on proclamation to a ſecretary of ſtate, on a charge of miſdemeanor, the ſecretary may bind him to appear in the king's bench, but cannot oblige him to give ſureties for his good behaviour, *Reg. v. Tutchin*, 164

2. If a perſon ſurrender to an information for a miſdemeanor, he may, on renewing his recognizance, have *time to plead*; but if he is brought in on a *capias*, he muſt plead *inſtanter*, *Reg. v. Tutchin*, 165

3. A ſheriff cannot admit a perſon to bail who is arreſted for a miſdemeanor, *Anonymous*, 179

MISNOMER.

1. If a man ſued by the name of *Benjamin* plead in abatement that he was baptized by the name of *John*, with a TRAVERSE that the ſaid *John* was ever known by the name of *Benjamin*, the plea is bad, *Walden v. Holman*, 115

2. It is not a good plea in abatement for a defendant to ſay he was baptized by another name, without ſhewing that he was always known by it, 116

3. If there be father and ſon of the ſame Chriſtian names, a declaration againſt the ſon *in cuſtodiâ mareſchalli* is good, without diſtinguiſhing him by the addition of *junior*, *Lepiot v. Brown*, 198

4. If *A.* make a bond in the name of *B.* and is ſued by the name of *B.* he may plead *miſnomer*, *Linch v. Hooke*, 226

5. A declaration in debt on bond, that the defendant became bound by *the name* of *John Villars, Viſcount Purbeck*, and *Earl of Buckingham*, is good; but the better way is, to recite the *titles* under an *alias dictus*, *Villars v. Cary*, 303

6. A *miſnomer* in a bail-bond, and a *reddidit ſe* variant from the firſt writ cannot be amended, *Bernardiſton's Caſe*, 309

7. A wife, after bail-bond given, may plead a *miſnomer*, *Lynch v. Hooke*, 310

MIS-TRIAL.

1. If an indictment for a conſpiracy againſt ſeveral charge the acts of ſome of the defendants in the pariſh of *St. Giles* in *Middleſex*, and of the others in the pariſh of *St. Margaret's* in the ſame county, and a *venue* be awarded to *St. Giles* only, it will be a *miſ-trial*, for the jury ought to come from both pariſhes, *Reg. v. Tracy*, 179

2. If a *venire facias de novo* be granted on an indictment after a *miſ-trial*, the defendant muſt enter into a new recognizance, *Reg. v. Tracey*, *ib.*

MONEY.

In what caſes money may be brought into court, 11. 25. 101. 153

N.

NAVIGABLE RIVERS.

1. If a perſon hold land adjoining to a navigable river, every one who has occaſion to uſe the river has a right of way by the brink of the water over that land, or farther in if neceſſary, *Reg. v. Chaworth*, 163

2. *Sed*

2. *Sed quære*, if this right must not be founded either on *ſtatute* or on *uſage*; for it is decided, that the public are not intitled, of *common right*, to tow on the banks of ancient navigable rivers, *Bull v. Hebers*, 163 *notis*

NEW TRIAL.

See TRIAL.

NISI PRIUS.

1. All crown cauſes in the court of king's bench muſt be tried at BAR, unleſs the attorney-general will grant a *niſi prius*, *Reg. v. Banks*, 247

2. A *niſi prius* granted by ſurpriſe may be ſuperſeded by the court of king's bench, *Reg. v. Banks*, *ib.*

NOLLE PROSEQUI.

1. The practice of the attorney-general entering a *nolle proſequi* upon an *indictment* began in the latter years of the reign of *Charles the Second*; but on *informations*, the practice has been frequent long antecedent to that period, by HOLT, *Chief Juſtice*, 262

2. A *nolle proſequi* does not diſcharge *the crime*, it only puts the defendant *without day*; and though there has never been any proceedings after a *nolle proſequi*, yet the attorney-general may, if he think proper, iſſue *new proceſs* on the ſame indictment; but an acquittal on "*not guilty*" pleaded, whether by *verdict* or *confeſſion*, goes to the fact charged, and clears the defendant both of the indictment and the crime alledged againſt him, *Goddard v. Smith*, *ib.*

NONSUIT.

After a nonſuit in replevin, it is too late to object that the avowry ſtates a *particular eſtate*, without ſhewing its *commencement*, or a *ſeiſin in fee*, *Anonymous*, 223

NON-TENURE.

"*Non-tenure*" cannot be pleaded by implication, *Adams v. Savage*, 226

NOTICE.

1. In a *town cauſe*, if the defendant live above forty miles from *London* or *Weſtminſter* there muſt be *fourteen days* notice of trial; but if he live within forty miles, *eight days*, excluſive of the day of notice and the day of trial, muſt be given, purſuant to the 14. Geo. 2. c. 17. ſ. 4. *Anonymous*, 18

2. In treſpaſs for making replevin, after notice of a claim of property *the notice* only is in iſſue, *Leonard v. Stacy*, 69

3. What notice ought to be given on executing a writ of enquiry, *Williams v. Jackſon*, 146

4. Where a Term's notice of trial is required, there muſt, at the ſame diſtance of time, be the like notice of executing a writ of enquiry, *Peyton v. Burdus*, 146 *notis*

5. A Term's notice of trial muſt be given in all caſes where the proceedings have been delayed, except by injunction out of chancery, for four Terms, *ib.*

6. The holder of a bill of exchange muſt give notice within a reaſonable time, if it be not accepted, or if accepted, not paid, 148 *notis*

NUISANCE.

1. To bring a large ſhip of three hundred tons into *Billingſgate Dock*, which is a dock only fitted to receive ſmaller veſſels, and not free for all ſhips, is a public nuiſance, *Reg. v. Leech*, 145

2. If a man by continually driving a cart along a *horſe-way* render it leſs convenient to riders, it is a nuiſance, *ib.*

O.

OFFICE AND OFFICER.

1. If a man be made *an officer* by act of parliament, and miſbehave himſelf in his office, he is indictable for it at common law; and any public officer is indictable for miſbehaviour, *Anonymous*, 96

2. In what caſe articles may be exhibited at ſeſſions againſt a *clerk of the peace*, *Reg. v. Barnes*, 194

3. If a perſon hold an *auditor's* office for life, and depute another to exerciſe the ſaid office during his good behaviour, a bond given by ſuch deputy to pay his principal yearly, during the ſaid deputation, 200l. and that in conſideration thereof the deputy ſhall have all the rents and profits of the ſaid office to his own uſe, is void by 5. & 6. Edw. 6. c. 16. for it is a bond to pay a certain ſum at all events, *Godolphin v. Tudor*, 234

4. If a perſon be put in as deputy to an office, without any ſtated ſalary, he has no remedy but by bringing a *quantum meruit* againſt his principal, 235

ORDER.

1. If an order on which an appeal lies be removed by *certiorari* before appeal, it ought not to be filed until the Court is informed of the matter, and then they will grant a *procedendo*, notwithſtanding the *certiorari*, 40

2. An order for the payment of ſo much money for work and labour, without ſaying "in huſbandry," is bad, *Reg. v. Corbet*, 91

3. Same point, *Reg. v. London*, 204

4. An order of ſeſſions may be vacated during the ſeſſions, and a ſubſequent order is a virtual repeal of a prior order to the ſame effect, *St. Clement's v. St. Andrew's*, 287

OVERSEERS.

1. An order appointing overſeers muſt ſtate them to be *ſubſtantial houſeholders*, purſuant to the words of the 43. Eliz. c. 2. *Rex v. St. Andrew's*, 77

2. *Quære*, Whether an order appointing overſeers for that part of a pariſh which lies in a particular county be good, *ib.*

3. Overſeers are not obliged to lay out their own money for the uſe of the pariſh, and if they do, they can only be re-imburſed out of the monies ariſing from a poor's rate made during their continuance in office, *Reg. v. Pariſh of Littleport*, 97

4. A *clergyman* is exempted from ſerving the office of overſeer, *Anonymous*, 140

5. By 1. Will. & Mary, c. 18. *diſſenting miniſters*, and by 31. Geo. 3. c. 32. *Roman Catholic prieſts*, are, under certain conditions, exempted from ſerving the office of overſeer, 140 *notis*

OUTLAWRY.

1. If there be an outlawry upon an indictment, and the outlawry is reverſed, the indictment ſtands good, and open to proceed upon, *Morgan v. Tomkins*, 115

2. When outlawry is pleaded, it muſt be under ſeal, 181

OYER.

1. Formerly, all demands of *oyer* were made in open court, as they muſt now be in caſe of appeals: but now it is demanded and granted between the attornies, *Longville v. Thiſtlewaith*, 28

2. Where *oyer* ought to be granted, the defendant is not bound to plead without it, *Longville v. Thiſtleworth*, *ib.*

3. After a plea in abatement, there cannot be *oyer* of *the original*, 27

4. If a plaintiff give *oyer* of a deed not declared on, the defendant may plead on it, *Cook v. Remington*, 237

P.

PALACE.

A palace retains its privileges, although the king and his court wholly remove from it, *Elderton's Caſe*, 74

PARISH-CLERK.

A *pariſh-clerk* is a temporal officer, and therefore not intitled to ſue in the ſpiritual court, 253

PARK.

No perſon can have a park in a manor, except by grant or preſcription, *Reg. v. Buccleugh*, 151

PARLIAMENT.

See ACTION ON THE CASE.

PARTNERS.

If one of ſeveral partners receive money on the joint account, and give his note for it, and enter his expenditures in the partnerſhip-books, and then the other partners poſſeſs themſelves of the books, and bring an action againſt him for the monies received to their uſe, the Court will not order the plaintiffs to produce the books at the trial; but the defendant may give them *notice* ſo to do, and thereby raiſe a preſumption againſt them if they refuſe, *Ward v. Apprice*, 264

PAYMENT.

1. If the holder of a bill of exchange for 60l. ſend his ſervant with it to the payee for payment, and the payee give the ſervant a draft for it on his banker for 100l. and the banker writes off 60l. from the draft, but the ſervant, inſtead of receiving the ſixty pounds in *money*, takes *a note* for ſixty pounds from the banker on a merchant, who immediately afterwards becomes inſolvent, and refuſes to pay the note, the act of *the ſervant* ſhall not, in ſuch caſe, bind his *maſter*; for the ſervant was ſent to receive *the money* from the payee of the bill, and not *the note* from the banker; and therefore the maſter may recover the ſixty pounds from *the banker* as ſo much money had and received to his uſe from the *merchant*, *Ward v. Evans*, 36

2. Collectors of taxes cannot compel the inhabitants to come before them out of the county to make payment thereof, *Anonymous*, 145

3. A draft by a third perſon given by a vendee to a vendor in payment will not diſcharge the debt, if the drawer is not to be found, and the holder uſe due but ineffectual diligence to get it paid, *Popley v. Aſhley*, 147

4. By 3. & 4. Anne, c. 9. ſ. 7. if any perſon accept a bill of exchange in ſatisfaction of a former debt, it ſhall be deemed complete payment, if he do not take due courſe to get it paid, 148 *notis*

5. What ſhall be conſidered due courſe, *ib.*

PEACE.

1. The cauſes of demanding *ſurety of the peace* muſt be ſet forth in the articles, *Dennis v. Lane*, 132

2. If a gentleman viſit a young lady as her lover, and, on her parent's denying him acceſs, he intrudes himſelf rudely into the houſe, follows the young lady on a journey taken to avoid him, aſſaults the perſon under whoſe protection ſhe is placed, and threatens to force her from him, it is a good cauſe to demand ſurety for his *good behaviour*; and although *the ſurety* muſt be demanded recently after *the cauſe* happens, and while *the fear* it occaſions exiſts, yet if the party, at any diſtance of time afterwards, do any act, though to another perſon, which ſhews that the *old grudge* remains, the Court will couple the laſt act with the antecedent cauſe of fear, and, on articles exhibited, grant *ſurety of the peace*, *Dennis v. Lane*, 132

3. The Court may require bail for ſuch a period of time as they ſhall think neceſſary for the preſervation of the peace, *Reg. v. Bowes*, 132 *notis*

4. In what form a recognizance to keep the peace may be taken, *ib.*

PENALTY.

When a ſtatute gives a penalty to *the king* and the *informer*, and the informer does not ſue within the year, the king may ſue for the whole penalty at any time within *two years*, *Reg. v. Franklin*, 220

PENSION.

A ſpiritual perſon may ſue in the eccleſiaſtical court for a *penſion*, although not originally granted or confirmed by THE ORDINARY, *Parker v. Clerk*, 253

PER NOMEN.

A declaration in debt on bond, stating, that the defendant became bound *by the nam* of *John Villars, Viscount Purbeck*, and *Earl of Buckingham*, is good. *Villars v. Cary*, 303

PERJURY.

1. If an indictment for perjury, in reciting the record of the trial, state a fact as happening between *A B.* and *C.* and it appears from the record produced in evidence, that the fact happened between *A.* and *B.* only, the *variance* is fatal, *Reg. v. Carter*, 168

2. "*Barnep*" for "*Barnap*," and "*orientati*" instead of "*orientali*," are fatal variances between an indictment for perjury and the record of the trial, *Reg. v. Carter*, *ib.*

3. In perjury, if the record of the trial be not entered up, it cannot be proved by the minutes, *ib.*

4. If there be two indictments against a defendant for perjury, and he takes the records down to trial, he may bring on which of them he pleases first; but the attorney-general may enter a *nolle prosequi*, and so force him to bring on the other, *Reg. v. Carter*, *ib.*

PHYSIC.

An apothecary visiting a patient, judging of his disease, and sending in medicines for its cure, is not a *practising of physic* contrary to the 14. & 15. Hen. 8. c. 5. provided he only charge for the medicines, *The College v. Rolfe*, 44

PLEADING.

1. In trespass for throwing down rails and entering a wharf, if the defendant plead that *A.* was possessed of *the wharf* under a lease then unexpired, and had *a way* from thence over the *locus in quo*, and underlet the same to the defendant with *all ways*, &c. necessary to the enjoying of the same, and that he the defendant had no other way to the *terminus ad quem*, the allegation "that the defendant had no "other way" is surplusage; and an issue taken thereon is an immaterial issue, *Staple v. Heydon*, 1

2. If a *right of way* be claimed by *necessity*, the opposite party may plead that the claimant has *another way* than that which he claims; but such a plea is not good where the right of way is claimed by *grant* or *prescription*, *Staple v. Heydon*, 4

3. Where a *particular estate* is pleaded, the plea must shew a seisin in fee, *Staple v. Heydon*, *ib.*

4. A repleader shall not be granted after a demurrer, *ib.*

5. If one of two defendants *demur*, and the other plead *to issue*, and a *venire facias* go to try the issue and inquire of contingent damages, and before the day of *nisi prius*, the plaintiff gives the defendant who demurred a *release*; *qu.* Can this release be pleaded at the day of trial *puis darrein continuance*, or be taken advantage of at the *day in bank*, 9

6. In an action of slander, for calling the plaintiff "*a thief*," the defendant cannot plead in justification, that the plaintiff "*received a thief*," *Staple v. Heydon*, 10

7. An indictment against a *common scold*, must expressly charge the defendant with being a *common scold*; for these are in this case words of art, and cannot be supplied by any epithets tantamount, as *common slanderer*, &c. *Reg. v. Foxby*, 11

8. In trespass for taking "two cows and "also a load of wheat, the goods of "the plaintiff," the words "*the goods* "*of the plaintiff*" shall refer only to *the wheat*, and therefore the declaration is ill as to *the cows*, inasmuch as *they* are not laid to be the goods of the plaintiff, *Jose v. Mills*, 15

9. A declaration in an action on the case for disturbance of common, stating that the plaintiff was *seised* of *lands* parcel of such a manor, and that he held them by copy of court roll. as a customary tenant according to *the custom* of the said manor, and that he had

had in reſpect thereof a *right of common* by cuſtom on ſuch a parcel of the manor, is bad on *demurrer* for not alledging that the lands were held at the *will of the lord*, but it is good *after verdict*, for as the lands are alledged to be *parcel of the manor*, they ſhall then be intended *copyhold*, *Crowder v. Oldfield*, 19

10. A declaration in an action for damages is good upon the *poſſeſſion* againſt a *wrong doer*, without ſtating further *title*, 21

11. If a perſon be beyond ſea at the time a debt accrues to him, and, on action brought to recover it, the defendant pleads the ſtatute of Limitations, he may *reply* to this *bar*, that he was beyond ſea at the time the debt accrued, and ſhew that the action was brought within ſix years after his return, *Ewer v. Jones*, 26

12. If to a libel in the court of admiralty, the ſtatute of Limitations be pleaded, that *it appears by the libel that the ſuit was ſix years after the cauſe of action aroſe*, it is bad, *Ewer v. Jones*, *ib.*

13. In an action of HUE AND CRY, if the defendant plead in abatement, that the robber was taken, and on demurrer a *reſpondeas ouſter* be awarded, the defendant cannot pray *oyer* of the writ, although in the ſame Term; for after a plea *in abatement*, there cannot be *oyer* of the *original*, *Longville v. Hundred of Thiſtleworth*, 28

14. Where a plaintiff ſues an execution, the defendant may plead *a tender* and *tout tems pres*, but he cannot pay money into court to have it ſtruck out of the declaration, 29

15. If an indictment charge the defendant with having falſely arreſted the plaintiff by virtue of a certain warrant, and thereby extorted divers ſums of money from him, "he the defendant well knowing the ſaid warrant "to be forged and counterfeited;" *quære*, Whether the allegation of the forgery is ſtated as *a deſcription* of the offence, or only in *aggravation* of it, *Reg. v. Tracy*, 31

16. If a declaration be of *Michaelmas Term* generally, and the fact laid is on the *fifteenth of November* in the ſame year, it is bad, for as the declaration relates to the firſt day of the Term, it appears that the action was commenced before the cauſe of action aroſe; but if, on examination by reference to THE MASTER, it ſhall appear that the declaration was in truth filed after the fifteenth of *November*, as if *the bail* was filed, or the *bill of Middleſex* taken out after that day, it ſhall be ſet right by the Court, although it could not be amended by any of the ſtatutes of *Jeofails*; for if bail was filed ſubſequent to the fifteenth, it would well warrant A SPECIAL MEMORANDUM of the day on which the declaration was really filed, as none are in *the cuſtody of the marſhal* until bail is filed, *Wiat qui tam v. Ayland*, 33

17. Treſpaſs for breaking the plaintiff's cloſe, treading his graſs, and hunting and killing his rabbits, with a *continuando* of the ſaid treſpaſs, as to all the particulars, on divers days and times, from ſuch a time to ſuch a time, is good, *Mouckton v. Aſhley*, 38

18. But treſpaſs for cutting a tree or killing ſo many rabbits on a particular day, or entering a rick yard and taking ſo many loads of hay on a particular day, laid with a *continuando*, is bad, 40

19. If an *ouſter* be laid in the declaration, a *re-entry* muſt alſo be laid, in order to recover the *meſne profits*; but if there be an entry, it may be laid with a *continuando*, if it will bear one, and the plaintiffs may recover damages for the entry and the *meſne profits*: by HOLT, *Chief Juſtice*, 40

20. A ſpecial juſtification muſt be of matter of *fact* and not of *record*; for matter of record muſt be pleaded even by an officer, *Anonymous*, *ib.*

21. If a record of the court of king's bench be pleaded, "*nul tiel record*" is a compleat iſſue, *Anonymous*, *ib.*

22. Pleas in bar need only be certain to a common intent, *Claxton v. Baſty*, 58

23. A *proviſo* is not neceſſary in pleading *a writing*, although it was under *ſeal*, unleſs it was delivered as *a deed*, *Claxton v. Buſby*, 58

24. If the law give a man *a licence* for the doing a thing, and an action of treſpaſs is brought, the licence muſt be pleaded, for it cannot be given in evidence on the general iſſue, *Leonard v. Stacey*, 69

25. Therefore in an action of covenant by a maſter againſt his apprentice for leaving his ſervice, if the abſence was with the maſter's permiſſion, *the leave* muſt be pleaded in juſtification, *Anonymous*, 70

26. In treſpaſs for breaking and entering the plaintiff's houſe, and carrying away his goods, A PLEA of *not guilty* as to the breaking, and A JUSTIFICATION by virtue of proceſs from an inferior court as to the *entering*, without ſaying any thing as to the *carrying away*, is bad, *Brigs v. Collingſon*, *ib.*

27. A juſtification by virtue of proceſs muſt alledge that the proceſs was delivered to the defendant, *Brigs v. Collingſon*, *ib.*

28. When a ſheriff juſtifies treſpaſs under a writ, he muſt ſhew that the writ was returned, *Brigs v. Collingſon*, 71

29. *Quære*, In an action for an eſcape from cuſtody under proceſs from an inferior court, whether it be neceſſary to ſtate in the declaration by what authority the Court was held, *Miſcealſin v. Caweſey*, 72

30. If a plaintiff ſue by the addition of *gentleman*, and the defendant pleads in abatement, that he is not a gentleman, the plea is good after a demurrer to it; for it is a confeſſion of the fact, *Batterſby v. Marſh*, 80

31. In replevin, "*property in a ſtranger*" may be pleaded either in bar or in abatement, *Proſgrove v. Saunders*, 81

32. Pleading that an award was *made* implies that it was *ready* to be delivered, *Robiſon v. Calwood*, 82

33. If a feoffment be pleaded in ſatisfaction of a bond, the acceptance muſt be laid in the county where the feoffment was made, *Williams v. Barrow*, 82

34. Pleadings in abatement on a writ of *homine replegiando*, *Lord Banbury v. Woods*, 84

35. Pleadings in replevin of a mare taken in the highway *damage feaſant*, with a plea in maintenance of the declaration, demurrer, joinder, judgment, writ of error, and other proceedings thereon, *Croſſe v. Bilſon*, 102

36. In replevin, if the defendant plead *in bar*, and demur to the replication *in abatement*, the plaintiff, after joinder in demurrer, ſhall have *final judgment*, on the demurrer being overruled, *Croſſe v. Bilſon*, *ib.*

37. In replevin, if the taking be avowed *in another place*, the freehold of the defendant, as *damage feaſant*, and the plea traverſe the place in the declaration, and conclude with praying judgment and a return; this is a plea in bar, *Croſſe v. Bilſon*, *ib.*

38. Where matter *in abatement* is pleaded *in bar*, final judgment ought to be given, *ib.*

39. In replevin, if a demurrer to a repleader to a plea in bar conclude, "Wherefore as before he prays judgment, *and that the declaration may be quaſhed*," theſe laſt words are ſurpluſage, *ib.*

40. In replevin, if the defendant plead "*property in himſelf*" he ſhall have a return without cognizance, but if he plead "*property in a ſtranger*" he muſt make cognizance, *Croſſe v. Bilſon*, 103

41. Matter pleaded *in bar* and concluding *in abatement*, ſhall be taken in bar, *ib.*

42. In replevin, if the defendant avow at a *different place* to have return, he may plead in abatement, and traverſe the place laid in the declaration, *Croſſe v. Bilſon*, *ib.*

43. A declaration in an action of ſlander for ſaying, "There goes *A.* who is "one of thoſe that ſtole *B.*'s deer," muſt aver that a deer was ſtolen from *B.* and that it was tame, *Ogden v. Turner*, 104

44. Plead-

44. Pleadings by bill againſt an officer of the court of king's bench in an action of debt on bond, in which, after *oyer*, the defendant pleaded "*knight-hood*" in diſability of the plaintiff, with demurrer and joinder thereon, *Lett v. Mills*, 105

45. A *venue* need not be laid in a plea of abatement, when pleaded in diſability of the plaintiff, 106

46. A plea in abatement, that the plaintiff received the order of knighthood, muſt alledge that he was *a knight* at the time the action was brought, *ib.*

47. If an attorney of the common pleas, on being ſued in the king's bench, plead his privilege, the plea need not be *verified*, nor the *writ of privilege* ſet out, 114

48. If a *traverſe* be tendered to an inquiſition of *forcible entry*, reſtitution ſhall not be granted, *Anonymous*, 115

49. If a man lay a day in his declaration that is not material, and the defendant, by his plea, make it material, and then the plaintiff, in his replication, varies from the day in the declaration, it will be *a departure*; otherwiſe if the day had not been made material by the plea, *Anonymous*, *ib.*

50. If a man ſued by the name of *Benjamin*, plead in abatement that he was baptized by the name of *John*, with a TRAVERSE that the ſaid *John* was ever known by the name of *Benjamin*, the plea is bad, *Walden v. Holman*, 116

51. Pleadings in an action on the caſe for ſtopping ancient lights, *Roſewell v. Peyor*, *ib.*

52. In ſuch an action it is ſufficient to declare that the plaintiff was *poſſeſſed* of ſuch a meſſuage for years, and *had and ought to have* ſuch lights, without ſtating that the *meſſuage* and the *lights* were *ancient*, *Roſtwell v. Pryor*, *ib.*

53. In treſpaſs *vi et armis*, for taking the plaintiff's goods in *Dale*, the defendant cannot plead in juſtification generally, that the place WHERE is his *freehold*, and that the goods were there *damage feaſant*, *Elwis v. Lombe*, 117

54. If a man bring treſpaſs for taking his cattle in *Black-acre* on ſuch a day, and the defendant juſtify the taking at another place *damage feaſant*, the plaintiff may make a *novel aſſignment*, if there were two takings, *Elwis v. Lombe*, 119

55. If a wife be falſely impriſoned, a declaration by huſband and wife, with a *per quod* his domeſtic concerns remained undone, and concluding, to the damage of both, is good, *Ruſſell v. Corn*, 127

56. If a declaration contain two counts; the firſt on *mutual promiſes* for money won at play; the ſecond on an *indebitatus aſſumpſit* to pay "the ſaid ſum "won at play aforeſaid," the latter count is bad, *Smith v. Aiery*, 129

57. A declaration in *aſſumpſit* by an *aſſignee* ought to ſtate the promiſes as made to *the bankrupt*, unleſs an *expreſs promiſe* is made to the *aſſignee*, *Anonymous*, 131

58. An aſſignee may declare in his own name for money had and received ſubſequent to the aſſignment, *Anonymous*, 131

59. Archdeacons have only a *preſcriptive* and not a *common right* to grant adminiſtration; and a judgment is *bona notabilia* in the place where it is given: if therefore a judgment be given at *Weſtminſter*, and the adminiſtrator of the plaintiff bring a *ſcire facias* againſt the *terre-tenants* of the defendant, ſtating, that the inteſtate died on ſuch a day, and that adminiſtration was committed to him by the *archdeacon of Dorſet*; the Court will *ex officio* take notice that the adminiſtration, as to this judgment, is *void*; and the adminiſtrator ſhall take *nothing by his writ*, *Adams v. Savage*, 134

60. If an adminiſtrator bring a *ſcire facias* on a judgment recovered at *Weſtminſter*, ſtating himſelf "adminiſtrator," and reciting, as his title to ſue, letters of adminiſtration granted by the *archdeacon of Dorſet*, the error of ſuing for *bona notabilia* in one dioceſe, on adminiſtration granted in another, is not cured by the *terre-tenants* pleading to *the merits*, and omitting

to traverſe the validity of the adminiſtration; nor can the words "by the "archdeacon of *Dorſet*" be rejected as ſurpluſage; but if the plaintiff had only alledged generally in his declaration, that he was adminiſtrator, it would have been good, *Adams v. Savage*, 135

61. To an action brought for a bill of exchange with ſo much for intereſt due thereon, the defendant may plead tender and refuſal, and *encore pres*, and ſo diſcharge himſelf of the intereſt, *Anonymous*, 138

62. In debt on a recognizance againſt bail, if the defendant plead "no *ca-* "*pias* againſt the principal," and the plaintiff reply "*a capias*, as appears "by the record," A REJOINDER that "a writ of error was allowed before "the return of the *capias*," is a *departure* from THE PLEA, *Parkins v. Woolaſton*, 139

63. If a plaintiff ſue an executor, and die inteſtate after *interlocutory judgment*, and before the return of the *writ of inquiry*, and his adminiſtrator ſues a *ſcire facias* on the judgment, the defendant cannot plead a *judgment recovered* in debt on bond, and that he has no aſſets *ultra*; for the ſtatute 8. & 9. Will. 3. c. 11. does not authorize a *perſonal repreſentative* to make any other defence than his teſtator or inteſtate might have made to the *writ of inquiry*, and he could not in this caſe have pleaded ſuch a plea on that writ, *Smith v. Harmon*, 142

64. Pleas to the juriſdiction as well of inferior as of ſuperior courts muſt be verified on oath, and tendered in perſon while the Court is ſitting, *Sparks v. Wood*, 146

65. In covenant if the plaintiff declare on the breach of a covenant for quiet enjoyment, viz. "that the leſſor en- "tered and ouſted him of the pre- "miſes;" the defendant may plead, "that he entered to diſtrain for rent "arrear, *abſque hoc* that he ouſted "him *de præmiſſis*," *White v. Bodinam*, 150

66. In treſpaſs, matter of right muſt be ſpecially pleaded, *Dove v. Smith*, 153

67. In covenant on an indenture of apprenticeſhip, the defendant cannot, without firſt praying *oyer* of the indenture, plead that the covenants therein are performed, *Foxon v. Hyde*, 155

68. A plea under the ſtatute 8. & 9 Will. 3. c. 12. muſt ſhew that the party was inſolvent at the beginning of the ſeſſions, *Smith v. Bartlett*, 157

69. To *aſſumpſit* in the king's bench the defendant cannot plead another action depending for the ſame cauſe in the court of common pleas, *Rouſton v. Combat*, *ib.*

70. In replevin, if the defendant plead that he was ſeiſed of the place WHERE, and juſtify the taking *damage feaſant*, the plaintiffs may alledge that he was ſeiſed of *a third part* of the place WHERE, and traverſe the *ſole ſeiſin* of the defendant, *Gilbert v. Parker*, 158

71. Form of declaring in debt on a recognizance againſt bail, *Parkins v. Chatherton*, 159

72. In debt upon a ſingle bill payable with intereſt on demand, the defendant cannot give want of demand in evidence on *non eſt factum*, for it muſt be ſpecially pleaded, *Oſborn v. Hofier*, 168

73. An acquittal, if it be on a defect in the indictment, cannot be pleaded in bar to a ſecond indictment for the ſame offence, *Reg. v. Carter*, *ib.*

74. If an *excommunication* of the plaintiff be tendered for plea *in abatement*, it muſt, though ſigned by counſel, be produced under ſeal, 181

75. If a ſon borrow money for the uſe of his mother, and give a bond to pay it *on demand*, and the mother do not pay it, the obligee may declare on this bond againſt the obligor without ſtating any *ſpecial requeſt* to the mother to pay the money, *Harwood v. Turberville*, 200

76. In debt on bond, if the defendant plead that it was delivered as an *eſcrow* upon

upon a condition not performed, and ſo *not his deed*, a concluſion to *the country* is cured by replying a different *condition*, and traverſing the condition ſtated in the plea, *Buſhell v. Paſmore*, 217

77. If an *appeal of murder* be removed by *habeas corpus* into the king's bench, and the appellee be admitted to bail, he cannot be diſcharged on appearing to his recognizance, and producing a releaſe from the proſecutor, but muſt be arraigned upon the record, and then plead *the releaſe* and *autrefois acquit*, *Culliford's Caſe*, 219

78. The defendant may plead the award of a *collateral thing* in *ſatisfaction*, without averring that the award is performed, *Boiſloe v. Bailey*, 221

79. In an action on the caſe in an *inferior court* for negligently keeping the plaintiff's horſe, whereby he was negligently taken out of the defendant's ſtable and immoderately rode, it is not neceſſary to aver that the *immoderate riding* was *within the juriſdiction*, for the breach of the contract is the *git* of the action, *Stanyon v. Davis*, 224

80. But in *aſſumpſit* in an inferior court, for money had and received, the declaration muſt not only alledge that the defendant *promiſed to pay*, but that the money was *had and received* within the juriſdiction, *Trevor v. Wall*, 224 *notis*

81. If a plaintiff die between the day of *niſi prius* and the day *in bank*, the fact muſt be pleaded *puis darrein continuance*, *Fox v. Tilly*, 225

82. If *A.* make a bond in the name of *B.* and is ſued by the name of *B.* he may plead *miſnomer*, *Linch v. Hooke*, *ib.*

83. If an adminiſtrator bring a *ſcire facias* on a judgment by his inteſtate to warn the tenants, and the ſheriff return ſeveral *terre-tenants*, they cannot all appear and plead in abatement jointly, *Adams v. Savage*, 226

84. If, on a *ſcire facias* againſt *terre-tenants*, the ſheriff return, among others, *John* and *Sarah* his wife as tenants, a plea in abatement that *G. T.* is the tenant, is bad; for it is pleading "*non-tenure*" by implication, *Adams v. Savage*, 226

85. If a maſter give a bond to make his apprentice free of the city at the end of ſeven years, *if requeſted*, the defendant may plead to an action of debt on this bond, "that at the end of ſeven "years or after he was not requeſted, "&c." for he was not bound to do it except upon requeſt made at the time appointed for performance, *Fitzhugh v. Dennington*, 227. 259

86. If a bond bear date at any place *abroad*, that *place* muſt be ſtated in the declaration, with a *viz.* at ſuch a place in *England*, *Robert v. Harnage*, 228

87. A preſcription is well pleaded by ſtating, "that time out of mind ſuch "a CORPORATION did repair the aiſle "of the church, *ratione cujus* the "mayor and aldermen ſat there;" for though *the right* be in the whole body, *the enjoyment* may be in a ſelect number, *Jacob v. Dallo*, 231

88. In error on a judgment in debt, if the defendant plead a "releaſe of er-"rors," the plaintiff cannot reply, that the releaſe was of errors in another indictment, and traverſe its application to the judgment in queſtion, *Davenant v. Rafter*, 236

89. If on error on a judgment *pro debito et damnis*, A RELEASE be pleaded reciting the judgment to be *pro debito et damnis ultra miſis et cuſtagiis*, the variance is not material, *Davenant v. Rafter*, *ib.*

90. In what manner A PLEA of "re-"*leaſe of errors*" may conclude, *Davenant v. Rafter*, *ib.*

91. If iſſue be taken on a dilatory plea, it muſt *pray judgment* of the Court; but if it confeſs and avoid, the concluſion muſt be in maintenance of the writ, *Davenant v. Rafter*, 237

92. In an action of debt on bond for performance of covenants, the defendant, in pleading "covenants per-"formed," muſt ſhew the original indenture

denture from the counterpart, *Cook v. Remington*, 237

93. If the plaintiff give *oyer* of a deed not declared on, the defendant may plead on it, *Cook v. Remington*, *ib.*

94. To an action of assault and battery A PLEA of "not guilty within six "years" is bad on a general demurrer; for 21. Jac. 1. c. 16. limits such actions to four years, *Blackmore v. Tidderley*, 240

95. In debt by an administrator against an heir upon a bond of his ancestor, it need not be shewn in the declaration, in what way the defendant is heir to the obligor, *Denham v. Stevenson*, 241

96. An administrator, in an action of debt on bond against an heir, may declare generally that administration was in *due manner* committed to him by such a *peculiar*, without shewing the right of the peculiar to grant administration, *Denham v. Stevenson*, 242

97. If a plaintiff declare as a *clerk in court*, and the defendant plead that he is an *attorney*, traversing that he is a clerk in court, the plaintiff may reply that he is a clerk in court as appears by the record, without desiring it to be brought in, *Cockroft v. Smith*, 263

98. A declaration stating a promise by the defendant to pay so much money in consideration of the plaintiff's buying *as large a quantity of prunes as he should be able to procure*, is good, although it do not aver that the quantity stated to have been bought was as large a quantity as he was able to procure, *Scrimshaw v. Wigley*, 303

99. In debt on bond for 107l. if the defendant, on *oyer*, plead that he was indebted to the plaintiff in 92l 5s. 9d. and that the bond was given by way of corrupt agreement, to forbear that sum for a year, the plaintiff may reply that it was for a true and just debt, and traverse the corrupt agreement, without shewing how much the just debt was, *Villars v. Cary*, 303

100. A declaration in debt on bond, that the defendant became bound by *the name* of *John Villars, Viscount Purbeck*, and *Earl of Buckingham*, is good; but the better way is to put the titles under an *alias dictus*, *Villars v. Cary*, 303

101. A declaration in debt on bond to his damage of 200l. concluding *unde petit judicium et damna, &c.* is good on a special demurrer, *Villars v. Cary*, *ib.*

102. In debt by an administrator *durante absentiâ*, it must be shewn that the executor was absent *beyond the sea*, *Slater v. May*, 304

103. On a *scire facias* against bail, and "no *capias* against the principal" pleaded; A REPLICATION shewing a *capias* sued out after the year and a day from the giving of the judgment, is good, although no *scire facias* appear, *Cholmley v. Veal*, 304, 305

104. There are two ways of pleading *privilege*; 1st, with a *profert* of the writ; and, 2dly, as a matter of fact, *Phips v. Jackson*, 305

105. In what manner an *immemorial custom* must be pleaded, *Phips v. Jackson*, 306

106. A declaration in debt on bond, that on such a day the defendant became indebted to the plaintiff *per scriptum suum obligatorium*, is sufficient, without shewing *the date* of the bond, or that it was *sealed and delivered*, *Woodcock v. Morgan*, *ib.*

107. A plaint in debt on bond, "A. complains of B. &c. of a plea that he render to him 60l. of lawful money, "&c." without saying "which he "owes to him and unjustly detains, "&c." is bad, *Woodcock v. Morgan*, *ib.*

108. If a *feme covert* be arrested by a wrong name, and give a bail bond, yet she may plead *misnomer*; for her bond being that of a *feme covert*, she may plead *non est factum* to it; therefore it will not estop her, *Finch v. Hooke*, 307

109. In an action on the case by a lessee for years against the owner of the adjoining house, for not repairing a party-

party-wall, by which the plaintiff's house was damaged, it is not necessary to state that he was bound by *prescription* to repair the wall; it is sufficient to declare, that he was *possessed* of a messuage for a certain number of years, and that the defendant ought to repair the wall, &c. *Tenant v. Goldwin*, 312

10. The distinction is, where the plaintiff lays a charge upon the right of the defendant, and where the defendant himself prescribes in right of his own estate: in the former case the plaintiff is presumed to be ignorant of the defendant's estate, and cannot therefore plead it; but in the latter, the defendant, knowing his own estate, in right of which he claims a privilege, must set it forth, *Rider v. Smith*, 314 *notis*

POOR.

1. A legitimate child follows the settlement of its father until emancipation, or a settlement be procured in his own right, *Cunmer v. Milton*, 87

2. A posthumous child shall be settled in the parish of its father, *ib.*

3. It is a good cause, in an order of removal, to say that the party is "*likely* "*to become chargeable*," or that "*he* "*does not rent a tenement of* 10*l. a-year*," *Anonymous*, 88

4. A pauper cannot be removed from his freehold, *Anonymous*, *ib.*

5. An order of removal must adjudge that the pauper was *likely to become chargeable*, *Reg. v. Newnham Murry*, 163

6. An indictment lies for disobeying an order of justices in not receiving and providing for a poor parish apprentice, *Reg. v. Gold*, 164

7. If a son be bound apprentice to his father, and the father give up his indentures to the son, and hire him out in another parish where he serves a year, he is settled in his father's parish; for the indentures not being cancelled, the apprenticeship continues, *Reg. v. Thornby*, 191

8. If a woman with child be fraudulently removed from *A.* to *B.* and delivered in the parish of *B.* and the order is afterwards quashed, the child is not settled at the parish of *B.* *Westbury v. Cosheen*, 213

POSSESSION.

The possession of one joint-tenant is the possession of the other, *Ford v. Lord Grey*, 44

POWER.

If the lord of a manor be empowered by the custom of the manor to grant copyhold estates "to three persons, "*habendum* to them successively as "they shall be named, and not other-"wise," yet a grant to *A.* for his own life, and for the lives of *B.* and *C.* is a good execution of the power, *Smartle v. Penhallow*, 63

PRACTICE.

1. The Court may in its discretion refuse to award *a repleader* until after trial, if the verdict will cure the fault in the pleadings, 3

2. In what cases an *imparlance* shall be allowed in real and in personal actions, 5, 6

3. A motion to stay proceedings on a bond on payment of the principal, interest, and costs, cannot be made until bail be put in, *Anonymous*, 11

4. A clerk in court may confess an indictment for his client, 17

5. If the plea-roll of one Term be put on the file of another Term by mistake, the Court will order it to be rectified, *Reg. v. Warden of the Fleet*, 18

6. If, after issue joined, no proceedings be had by the plaintiff for *four Terms*, the defendant is entitled to *a Term's notice*, and the Term in which the issue is joined is inclusive; but *notice* at any time within *the year*, though countermanded, is a proceeding within *four Terms*, *Anonymous*, *ib.*

7. Anciently

7. Anciently fourteen days notice of trial was neceſſary, except where the aſſizes were held within fourteen days after the Term; but now, by the 14. Geo. 2. c. 17. ſ. 4. "in cauſes tried at "the Sitting at *Weſtminſter*, or in *Lon-* "*don*, where the defendant reſides "above *forty miles* from the ſaid cities "reſpectively, there ſhall be notice "given of trial *ten days* before ſuch "intended trial;" and the practice is to give *eight days* notice; but if the defendant live above *forty miles* from town, the ancient rule of *fourteen days* prevails, *Anonymous*, *ib.*

8. The notice to be given within the *four Terms*, where no proceedings have been had for a year, muſt be within the laſt Term, *ſedente Curiâ*, 19

9. A priſoner who eſcapes, and is retaken on a warrant, on 5. Ann. c. 9. cannot be diſcharged on bringing the money into court, *Hotherſhell v. Bows*, 21

10. If a perſon come in upon *habeas corpus*, and the plaintiff do not declare in two Terms, the defendant ſhall be diſcharged on filing common bail, *Hotherſhell v. Bows*, 22

11. If a perſon come in upon *habeas corpus*, though he put in bail, yet, if it be not at the return of the proceſs, he cannot give rules, but muſt wait two Terms, and then, if there be no declaration, he ſhall be diſcharged on filing common bail without coſts, *Hotherſhell v. Bows*, *ib.*

12. If a declaration be delivered in *Hilary Term*, and rules of pleading given, and the defendant do not plead before the *eſſoin-day* of *Eaſter Term*, the plaintiff may ſign judgment for want of a plea; but if the plaintiff, in that caſe, has not given rules in *Hilary Term*, he muſt give them in *Eaſter Term* before he can ſign judgment, *Anonymous*, *ib.*

13. A motion in arreſt of judgment cannot be made until THE POSTEA be brought in, and the defendant ſhould give a rule thereon; which is in itſelf a notice to bring it in, *Wood v. Shepherd*, 24

14. By the practice of the common pleas, the clerk of aſſize keeps THE POSTEA until the days for moving in arreſt of judgment be paſt, and therefore in that caſe the notice muſt be given to the clerk of aſſize, to attend with it; for he ought not to deliver it to any but the clerk in court, *Wood v. Shepherd*, 24

15. After notice there are twenty days allowed by the practice of the Court to except againſt bail, *Anonymous*, *ib.*

16. Bail cannot be juſtified before a Judge in his chamber, except it be by conſent, or for neceſſity in Vacation, *Anonymous*, *ib.*

17. On bail being juſtified in Vacation, the defendant is bound to accept a declaration to go to trial at the aſſizes if it be an iſſuable Term, *Anonymous*, *ib.*

18. There ought not to be a ſtay of proceedings on the bail-bond, upon bringing principal, intereſt, and coſts into court after notice of trial, without it be brought within ſuch time as the plaintiff may not be delayed of trial, *Butler v. Relfe*, 25

19. After a plea in abatement *oyer* cannot be granted of the original, though prayed in the ſame time, *Longville v. the Hundred of Thiſtleworth*, 28

20. Money cannot be brought into court to have it ſtruck out of the declaration, when the plaintiff ſues as executor, *Anonymous*, 29

21. A record once filed in the court of king's bench can never be remanded, *Reg. v. Bethell*, 33

22. The Court will, on payment of coſts, permit a defendant to withdraw his demurrer, and plead to iſſue, while the proceedings are in paper, *Godolphin v. Tudor*, 38

23. A writ of enquiry cannot be quaſhed until it be returned and filed; but before the return it may be ſuperſeded, *quia improviſè emanavit*, *Anonymous*, 40

24. If an order on which appeal lies be removed by *certiorari* before appeal, it ought not to be filed until the Court

Court is informed of the matter; and then the Court will grant a *procedendo* notwithſtanding the *certiorari*, *Anonymous*, 40

25. If, after a motion to quaſh an indictment for a miſdemeanor is overruled, the defendant will not plead until he is ſerved with a *peremptory rule*, his plea, by the practice of the court of king's bench, ought not to be received without bail to try the indictment in the ſame Term; but in ſuch caſe, if the defendant plead voluntarily, he need not go to trial until the next Term, *Reg. v. Orbel*, 42

26. The meaning of the rule that "after "a cauſe has ſlept four Terms after "iſſue joined, there muſt be a Term's "notice of trial," is, that there ſhall be ſome actual proceeding within the four Terms, *Leſauld v. Dyer*, 58

27. The ſtriking of a jury, or any motion in a cauſe, is a ſufficient proceeding, 58

28. Notice at any time during the ſitting of the Court, and within the laſt day of the laſt of the four Terms, is ſufficient, 58

29. If a *father* bring a writ of error to reverſe the attainder of his *ſon*, and a rule be obtained for its reverſal on the confeſſion of the attorney-general, the Court, though in the reign of a ſubſequent king, and after the death of the parties, will order the record of reverſal to be made up, on producing the writ, and the confeſſion of errors thereon, *Lord Mohun's Caſe*, 59

30. In debt upon a *judgment*, the Court will not ſtay the proceedings on motion upon payment of principal, intereſt, and coſts, as they will in debt upon bond, *Burridge v. Forteſcue*, 60

31. A priſoner for debt who eſcapes, and is re-committed on an eſcape-warrant, on the ſtatute 1. Ann. c. 6. cannot have *a day rule*; and a perſon in cuſtody at his ſuit ſhall be diſcharged on oath that nothing was due, *Cotton v. Martin*, 63

32. In ejectment, if the tenant be tricked out of poſſeſſion, the Court will order reſtitution, and commit the parties to anſwer interrogatories, *Saunders v. Melhuiſh*, 73

33. If a perſon committed on an *excommunicato capiendo* eſcape, a new writ ſhall iſſue, if the ſheriffs have not returned the old writ, or the party been removed by *habeas corpus*, *Reg. v. Bell*, 79

34. An attorney may enter a *remittit damna*, but not a *retraxit*, *Lamb v. William*, 82

35. In what caſes an attorney muſt be preſent when a perſon under an arreſt gives a warrant of attorney to confeſs a judgment in a ſuperior or inferior court, *Inman v. Crew*, 85

36. If an attorney undertake to appear and accept a declaration *de bene eſſe*, the plaintiff, on the attorney's refuſing to appear, cannot ſign judgment for want of a plea, *Wigg v. Rook*, 86

37. An attorney who undertakes to appear may be compelled to appear, *Wigg v. Rook*, *ib.*

38. In what caſes a bill may be filed againſt an attorney in Vacation time, *Anonymous*, 106

39. If *want of an original* be aſſigned for error, and *a releaſe* be pleaded, yet a *certiorari* to inform the Court whether there was any *original* or not, may be awarded in the ſame manner as if "*in nullo eſt erratum*" had been pleaded; but the party cannot demand it of right, *Carleton v. Mortagh*, 113. 206

40. After an indictment found, a plea cannot be received at the crown-office, unleſs the defendant enter into a recognizance to try it at his own charges, *Reg. v. Tracy*, 114

41. If *bail to the ſheriff* become *bail above*, they are not liable to exception after aſſignment of the bail-bond, *Grovenor v. Soame*, 122

42. If *a releaſe* be pleaded, and the plaintiff crave *oyer* of it, and the defendant will not grant it, the plaintiff

tiff may ſign judgment for want of a plea, *Anonymous*, 123

43. A Term's notice of trial muſt be given in all caſes where the proceedings have been delayed for four Terms, except the proceeding have been ſtopped by injunction, 146 *notis*

44. When a Term's notice of trial is required, there muſt, at the ſame diſtance of time, be the like notice of executing a writ of enquiry, *Peyton v. Burdus*, 146

45. The reaſon why fifteen days are required between the *teſte* and the *return* of proceſs, *ib.*

46. Pleas to the juriſdiction as well of inferior as ſuperior courts muſt be verified on oath, and tendered in perſon while the Court is ſitting, *Sparkes v. Wood*, *ib.*

47. If an attorney be well known, and may be found, it is not ſufficient to leave a declaration for him in *the office*, but it ought to be delivered to him, *Anonymous*, 153

48. In debt on a judgment, the defendant cannot pay money into court before *plea pleaded*, although the plaintiff is become bankrupt, *Anonymous*, *ib.*

49. If a perſon ſurrender to an information for a miſdemeanor, he may, on renewing his recognizance, have *time to plead*, but if he is brought in upon a *capias*, he muſt plead *inſtanter*, *Reg. v. Tutchin*, 165

50. At what time a plea in abatement muſt be pleaded, 175 *notis*

51. The practice reſpecting bringing writ of error on an indictment deſcribed, *Reg. v. Foxby*, 178

52. If a *fieri facias* be taken out, and the goods levied before judgment entered on the roll, and another *fieri facias* is delivered to the ſheriff upon another judgment, to which he returns *nulla bona*, and then the goods are ſold under the firſt writ, and ſatisfaction entered, but the roll not filed, the Court will not, on an action brought by the *ſecond plaintiff* againſt the ſheriff for a *falſe return*, give the *firſt plaintiff*, who had indemnified the ſheriff, leave to file his roll, *Herring v. Crocker*, 184

53. If judgment be given in any Term, it may, at any time after, be entered upon THE ROLL, as of the ſame Term in which it was given, *Hodges v. Templer*, 191

54. If a rule be made for a cauſe to ſtay until the Court be further moved, and the Court is divided, there needs no new rule from the Court, and the plaintiff without more may enter judgment upon the verdict, *Walmſley v. Ruſſell*, 204

55. If a caſe be put into the paper for argument, or the Court take time to adviſe, and the Court is divided, there can be no judgment, 204

56. An indictment againſt *ſeveral* for a *miſdemeanor* may be tried againſt *ſome* of the defendants only, on the others entering into a rule to plead *guilty* if their co-defendants are convicted, *Reg. v. Middlemore*, 212

57. If judgment upon a warrant of attorney be not entered within the year, it cannot be without leave of the Court on motion, *Anonymous*, 212

58. If the record be not certified on the return of a writ of error, the party may take out execution, *Anonymous*, 221

59. It is irregular to proceed on a bail-bond until the eſſoin-day of the next Term, *Anonymous*, 226

60. Upon a writ of error and bail put in, the defendant has *twenty days* to except againſt the bail, which exception ought to be entered in the clerk of the errors book, *Gibbon v. Dove*, 230

61. If exception is made to bail in error, the defendant ought to take out a rule to ſerve upon the plaintiff's attorney to put in better bail, but this rule need not be ſerved within the twenty days, but it muſt be ſerved before execution can be ſued out, *Gibbon v. Dove*, *ib.*

62. After a rule to ſign judgment there ought to be *four days*, excluſive of the day

day on which the rule is made and the judgment ſigned, *Reignolds v. Tipping*, 241

63. If a perſon be bound to appear in the king's bench on the firſt day of a Term, to anſwer to all matters alledged againſt him, and the attorney-general file an information againſt him on the ſame day, he ſhall have an imparlance until the enſuing Term, *Reg. v. Rawlins*, 243

64. The way to charge one in cuſtody in *Term-time* is, by filing a bill againſt him, and delivering a declaration to the turnkey, *Tilſden v. Parfriman*, 254

65. In what manner a priſoner in cuſtody may be charged with an action in Vacation time, 255 *notis*

66. The rule, that "a judgment above "a year old muſt be revived by *ſcire* "*facias* before execution can be taken "out on it," was intended to prevent the defendant's being ſurprized; and therefore if the year be exhauſted by delays occaſioned by the plaintiff, it is good, although no *ſcire facias* be taken out, *Michel v. Cue*, 283 *notis*

PRECEDENTS.

1. The record of an action on the caſe brought by a voter againſt the returning-officer, for refuſing to take his poll at the election for members of parliament, *Aſhby v. White*, 46

2. A record of the pleadings in abatement on a writ of *homine replegiando*, 84

3. Precedent of a record in replevin of a mare taken on the highway *damage feaſant*, with a plea in maintenance of the declaration, and demurrer, and joinder thereon, *Creſſe v. Bilſon*, 102

4. Precedent of proceedings *by bill* againſt an officer of the court of king's bench in an action of debt on bond, in which, after *oyer*, the defendant pleads "*knighthood*" in diſability of the plaintiff, with demurrer, and joinder thereon, *Lett v. Mills*, 105

5. Precedent of a declaration in an action on the caſe for ſtopping ancient lights, *Roſewell v. Pryor*, 116

6. Precedent of a record of *niſi prius* in a *ſcire facias* by an adminiſtrator againſt the *terre-tenants*, with the pleadings thereon, *Adams v. Savage*, 133

7. Precedent of an *indictment* for conſpiring falſely to charge another with being the father of a baſtard child, *Reg. v. Beſt*, 137

8. Precedent of a declaration in debt on a bond of arbitration, with plea, replication, &c. thereon, *Winter v. Garlick*, 195

9. Precedent of a declaration in an action on the caſe for maliciouſly indicting the plaintiff for barratry, with removal by *certiorari*, and diſcharge, *Goddard v. Smith*, 261

10. Precedent of an indictment for a fraud in exchanging a ſpurious liquor as good port wine for hats, *Reg. v. Maccartey*, 302

11. Precedent of a declaration by an adminiſtrator during the abſence of the executor for money lent by the inteſtate, *Slater v. May*, 303

12. Precedent of a ſpecial action on the caſe for not repairing a party-wall, whereby the plaintiff was injured, *Tenant v. Goldwin*, 311

PREROGATIVE.

See WRECK.

PRESCRIPTION.

1. A preſcription to have common for cattle *levant et couchant* upon a cottage is good; for a cottage muſt have land belonging to it, *Emerton v. Selby*, 115

2. The mayor of a corporation may, by grant or preſcription, have a right to give a caſting vote, but not of common right, 152

3. If a man be bound by preſcription to repair a way, he is not obliged to put it into a better ſtate than it has been time out of mind before, *Reg. v. Cluerth*, 163

PRINCIPAL AND INTEREST.

1. By 4. & 5. Anne, c. 16. "If at any "time pending an action on a bond

" for payment of money, with a pe-
" nalty, the defendant ſhall bring in-
" to court all the principal, and inte-
" reſt, and coſts, it ſhall be taken to
" be in ſatisfaction of the bond," 11

2. A motion to ſtay proceedings on payment of principal, and intereſt, and coſts, cannot be made until bail be put in, for till then the parties are not in court, *Anonymous*, *ib.*

3. There ought not to be a ſtay of proceedings upon a bail-bond upon bringing principal, intereſt, and coſts into court after notice of trial, without it be brought within ſuch time as the plaintiff may not be delayed of trial, *Butler v. Relfe*, 25

4. In debt on bond, the defendant on bringing in principal, intereſt, and coſts, ſhall be relieved from the penalty, *Ireland's Caſe*, 101

5. But where a bond is conditioned to account for monies to be received, the Court will not relieve from the penalty on payment of principal, and intereſt, and coſts into court, for in ſuch caſe damages may be recovered for more than the penalty, *Lord Lonſdale v. Church*, 102 *notis*

PRISONER.

1. A note diſcharging a poor priſoner confeſſing the action, 22

2. The priſoner alſo diſcharged after a ſurrender, *ib.*

3. A priſoner for debt under 100l. diſcharged by the late act by the juſtices of peace, and afterwards was taken up again for above 100l. he ſhall find bail, 301

PRIVILEGE.

1. If an attorney of the court of common pleas be ſued in the king's bench, and plead his privilege, he ſhall not be *ſworn* to his plea, nor need the *writ of privilege* be ſet out, *Anonymous*, 114

2. The maſter of the crown office, upon iſſue joined on a *ſcire facias*, is intitled to a *trial* AT BAR, *Anonymous*, 123

3. There are two ways of pleading *privilege*: 1ſt, with a *profert* of the writ; 2dly, as a matter of fact, *Phips v. Jackſon*, 305

PROCEDENDO.

1. If a *certiorari* has been iſſued improvidently, the Court will grant a *procedendo*, 17

2. A *procedendo* may be granted to the mayor's court in *London* after the return to a *habeas corpus* has been filed in the ſuperior court, *Faxakerley v. Buldoe*, 177

3. A *procedendo* ſhall be awarded to enable parties to appeal, *Peat's Caſe*, 229

PROCESS.

1. The manner in which proceſs on indictment and informations are to be returned, *Reg. v. Tutchin*, 268

2. What ſhall be conſidered diſcontinuance of proceſs, 269

PROCLAMATION.

If a proclamation iſſue to apprehend a perſon guilty of a libel, and he ſurrender himſelf to the ſecretary of ſtate, the ſecretary may bind him to appear in the court of king's bench, but cannot oblige him to give ſureties for his good behaviour, *Reg. v. Tutchin*, 165

PROFERT.

3. A *profert* is not neceſſary in pleading *a writing*, though under *ſeal*, unleſs it was delivered as *a deed*, *Claxton v. Baſly*, 58

PROHIBITION.

1. The court of king's bench will not grant a prohibition to the court of admiralty upon a ſuggeſtion of their having iſſued proceſs to compel the appearance of the defendant *in quâdam cauſâ ſalvagii*, *Tranter v. Watſon*, 12

2. But if the court of admiralty iſſue proceſs in the nature of an *embargo* to ſtop a ſhip going to the *Eaſt Indies*, contrary to the charter of the *Eaſt India Company*, a *prohibition* lies before appearance; for it is clear that it is not within their juriſdiction, 12

1. On a motion for a prohibition, a copy of the libel ought, in ſtrictneſs, to be always produced, *Trantor v. Watſon*, 13

4. A prohibition will not lie to the court of admiralty for refuſing a plea of the ſtatute of Limitations, if it be badly pleaded, *Ewer v. Jones*, 26

5. A *prohibition* will not lie to an inferior court on a ſuggeſtion of erroneous proceeding, provided it has juriſdiction on the ſubject, *Smith v. Mayor of London*, 78

6. If the court of admiralty proceed both againſt *the ſhip* and *the owners*, a prohibition lies as to the owners, *Johnſton v. Shepney*, 79

7. The Court will not grant a prohibition to a ſuit for tithes of barren ground, on the ſtatute 2. & 3. Edw. 6. c. 13. unleſs on affidavit that it was pleaded below, and refuſed, and the ſuggeſtion alledge the land to be *ſuapte naturâ ſterilis*, *Horner v. Bonner*, 86. 96

8. If the ſpiritual court refuſe a copy of *the articles*, they ſhall be prohibited *quouſque*, although the proceedings are *ex officio*, *Bennoyer's Caſe*, 87

9. If a contract be for four pounds, and a plaintiff, to give an inferior court juriſdiction, ſplit it into ſeveral actions, a *prohibition* ſhall go, *Catchmade's Caſe*, 91

10. A prohibition will not lie to an inferior court, on a ſuggeſtion that the party had tendered a plea to the juriſdiction, which was refuſed, unleſs it appear that the plea was verified, and tendered in perſon during the ſitting of the Court, *Sparks v. Wood*, 146

11. Previous to the *Marriage Act*, the ſpiritual court was not prohibited from proceeding to diſſolve a marriage contracted *per verba de præſenti* or *per verba de futuro*; for in both caſes the matter was matrimonial, and within the juriſdiction of the court: nor was it neceſſary to ſhew, that the object of the libel was a diſſolution of the contract, *Collins v. Jeſſott*, 155

12. A ſuggeſtion to prohibit the ſpiritual court from proceeding on a right to *a pew* in a church, muſt ſhew whether the church was *preſentative* or *donative*, *Jacob v. Dallo*, 239

13. If a *pariſh-clerk* ſue churchwardens in the ſpiritual court for money due to him by *cuſtom*; *Quere*, Whether the court of king's bench will grant a *prohibition* on a ſuggeſtion that there is no ſuch cuſtom, *Parker v. Clerk*, 253

14. The ſuggeſtion of a *modus* to prohibit a ſuit for tithe of *milk* muſt be proved within ſix months; for the 2. & 3. Edw. 6. c. 13. extends to ſuits for *ſmall tithes* as well as *great*, *Leiceſter v. Foy*, 261 *notis*

15. A prohibition cannot be granted upon a ſuggeſtion of *merits*, and alſo that the ſpiritual court refuſed a *copy of the libel*, for they are of different natures, *Anonymous*, 308

PROMISE.

1. If *A.* is about to hire a horſe from *B.* and *C.* in order to encourage *B.* to lend the horſe, ſay, "*Let A. have the horſe, and I undertake that he ſhall re-deliver it to you ſafely*," this is a *collateral promiſe* within 29. Car. 2. c. 3. and void, it not being in *writing*, *Burkmire v. Darnell*, 249

2. An agreement that a man ſhall enjoy certain lands which are in his poſſeſſion, and charged with an annuity to a third perſon without moleſtation from the annuitant, is not a ſufficient conſideration for a promiſe, *Strong v. Courtney*, 266

3. A promiſe to deliver a grain of rye on *Monday*, and an additional two grains, in arithmetical progreſſion, on every *Monday* during the year, is good, *Thornborough v. Whitacre*, 305

4. An *old debt* is revived by a *new promiſe* made after ſix years have expired, *Dean v. Crane*, 319

PROOF.

See EVIDENCE, WITNESS.

PUIS DARREIN CONTINUANCE.

See CONTINUANCE.

Q.

QUAKER.

A *quaker* may be indicted for keeping open ſhop on a faſt-day ordained by proclamation, *Anonymous*, 210

QUO WARRANTO.

If a perſon ſet up a leet, a fair, or a market, it is a uſurpation on the crown for which a *quo warranto* lies; and there may be two judgments, one for a ſeizure, and the other for a fine, *Anonymous*, 184

R.

RANSOM.

1. The maſter of a ſhip, having the care not only of the ſhip but of the goods on board, may, while under a capture by an enemy at ſea, if there are no hopes of a re-taking, compound with the captain captor for the ranſom of the captured ſhip and cargo, *Trantor v. Watſon*, 12

2. And this agreement to ranſom is ſo far binding on the owners, that if the captain captured advance the ranſom-money, he may recover it in an action at common law for money laid out and expended to their uſe, *Trantor v. Watſon*, 13

3. So if he deliver his own perſon into the cuſtody of the captain captor as a hoſtage for performance of the ranſom, he may libel againſt the ſhip in the court of admiralty for the money, *ib.*

4. For the *redemption* of the ſhip and cargo by means of *ranſom* is conſidered in the admiralty as a ſpecies of *ſalvage*, *ib.*

5. So a promiſe by a captain of a ſhip on behalf of his owners, when the ſhip was taken, to pay monthly wages to one of the ſailors, in order to induce him to become a hoſtage, is binding on the owners; although they abandon the ſhip and cargo, *Yates v. Hall*, 13 *notis*

6. But now by 22. Geo. 3. c. 25. "No "perſon ſhall ranſom or contract for "the ranſoming of any ſhip or cargo "captured by the enemy, under pe- "nalty of five hundred pounds, and "all contracts, agreements, bills, "notes, or other ſecurities, made or "given for ſuch purpoſes, are void, 13 *notis*

RATE.

1. If a houſe, originally entire, be divided into ſeveral apartments, with an outward door to each apartment, and no communication with each other, the ſeveral apartments ſhall be rated as diſtinct manſion-houſes; but if the owner live therein, all the untenanted apartments ſhall be conſidered as parts of his houſe, *Tracy v. Talbot*, 214

2. An inhabitant who comes into a pariſh in the middle of a quarter cannot be rated for the whole quarter, *ib.*

3. A diſtreſs cannot be made for a rate by a warrant iſſued before it is due, *Tracy v. Talbot*, *ib.*

4. A diſtreſs may be made for a quarter's rate before the end of the quarter, *Tracy v. Talbot*, *ib.*

5. By 43. Eliz. c. 2. ſ. 1. poor's rates ſhall be raiſed *weekly* or otherwiſe, 214 *notis*

6. By 17. Geo. 2. c. 38. ſ. 12. perſons coming into a houſe in the middle of a quarter ſhall only pay rates for the time they occupy the premiſes, *ib.*

7. A pariſh-rate may be diſtrained for in *a different pariſh* in the *ſame county*, *Tracy v. Talbot*, 215

RECOGNIZANCE.

1. In what caſe a recognizance is forfeited by not trying the cauſe, *Reg. v. Carter*, 168

2. A recognizance conditioned to try an indictment is forfeited, though there be a trial, if the verdict be ſet aſide for a defect in the *venire facias*, *Reg. v. Tracy*, 179

3. If a *venire facias de novo* be granted on an indictment after a miſ-trial, the defendant muſt enter into a new recognizance, *Reg. v. Tracy*, *ib.*

4. The ſheriff may take a recognizance, but not bail, for the appearance of a perſon arreſted by him under proceſs from

from the ſeſſions on an indictment for a miſdemeanor, *Bengough v. Reſſter*, 179 *notis*

5. If an indictment be removed by *the proſecutor* into the king's bench by *certiorari* out of *London* or *Middleſex*, the defendant muſt enter into A RECOGNIZANCE to try it the ſame Term, or the Sittings after; but if removed out of any other county he is *without day*, and if he do not appear proceſs ſhall iſſue till he be outlawed: but if *a defendant* remove an indictment, he muſt enter into A RECOGNIZANCE purſuant to the 5. Will. & Mary, c. 2. *Reg. v. Banks*, 246

RECORD.

1. If the record of iſſue and pleading be filed of a wrong Term by miſtake, the Court will order it to be rectified, *Reg. v. Warden of the Fleet*, 18

2. So if *venires* are put to wrong records they may be rectified, *ib.*

3. A record once filed in the court of king's bench can never be remanded, *Reg. v. Bethel*, 33

4. If a record of the court of king's bench be pleaded, "*nul tiel record*" is a complete iſſue, *Anonymous*, 40

RECUSANT.

A popiſh recuſant convict cannot prove a will, 239

REMAINDER.

If a man by deed grant a rent to *A.* and the heirs of his body, with remainder to *B.* and his heirs, this is a good remainder: *per* HOLT, *C. J.* 113

REPAIR.

1. *Solebat reparari*, where not good, 313

2. Caſe between buyer and vendee of houſes, 314

3. Where the vendor reſerves not the benefit of lights, *ib.*

4. Of repairing the upper chamber and lower foundation, *ib.*

REPLEADER.

1. If an impertinent, immaterial, or any other ſpecies of iſſue, be joined, on which the Court cannot give judgment, or on which, if judgment be given, the right between the contending parties will not be thereby determined, *a repleader* ſhall be awarded, *Staple v. Heydon*, 2

2. The Court might have awarded *a repleader* at common law on an immaterial iſſue, *Staple v. Heydon*, *ib.*

3. When a *repleader* is awarded, the *amendment* muſt begin where the plea which makes the iſſue bad begins to be faulty, although the award is general, and no direction from the Court, *Staple v. Heydon*, *ib.*

4. If a repleader be awarded where it ought not to iſſue, or be denied where it ought to iſſue, it may be aſſigned for error, *ib.*

5. A repleader being awarded on the judgment of the Court, the party in whoſe favour it is awarded is not intitled to coſts, *Staple v. Heydon*, 3

6. At common law the Court may grant *a repleader* before verdict; but, ſince the ſtatute of Jeofails, they are not bound to do it, but will, in their diſcretion, wait to ſee if the error is not cured by the verdict, *Staple v. Heydon*, *ib.*

7. No repleader can be awarded, if the parties are out of court by default, *Staple v. Heydon*, *ib.*

8. If a jury do not find *aſſets* to a certain value, *a repleader* ſhall be granted; for ſuch a verdict is inſufficient, *Staple v. Heydon*, *ib.*

9. A repleader ſhall not be granted after demurrer, 4

10. Same point, *Croſſe v. Bilſon*, 103

REPLEVIN.

1. If *A.* defraud *B.* of goods, and ſell them to *C.* and *B.* after notice that *C.* claims property therein, *replevy* them, *C.* may bring treſpaſs for the taking, *Leonard v. Stacey*, 69

2. In treſpaſs for making *a replevin* after notice of a claim of property, *the notice* only is in iſſue, *Leonard v. Stacey*, 69

3. Perſons concerned only as appraiſers in making a wrongful replevin are treſpaſſers, *Leonard v. Stacey*, *ib.*

4. In replevin, "*property in a ſtranger*" may be pleaded either in bar or in abatement, *Preſgrove v. Saunders*, 81

5. Precedent of a record in replevin of a mare taken in the highway *damage feaſant*, with a plea in maintenance of the declaration, and demurrer and joinder thereon, *Creſſe v. Bilſon*, 102

6. In replevin, if the defendant plead *in bar*, and demur to the replication *in abatement*, the plaintiff, after joinder in demurrer, ſhall have *final judgment* on the demurrer being over-ruled, *Creſſe v. Bilſon*, *ib.*

7. In replevin, if the taking is avowed *in another place* the freehold of the defendant as *damage feaſant*, and the plea traverſe the place in the declaration, and conclude with praying judgment and a return, this is a plea in bar, *Creſſe v. Bilſon*, *ib.*

8. In replevin, if a demurrer to a repleader to a plea in bar conclude, "wherefore as before he prays judgment, *and that the declaration may be quaſhed*," the laſt words are ſurpluſage, *Creſſe v. Bilſon*, *ib.*

9. In replevin, *priſel in autre lieu* is a plea in abatement, 103

10. In replevin, if the defendant plead "*property in himſelf*," he ſhall have a return without *cognizance*; but if he plead "*property in a ſtranger*" he muſt make cognizance, *Creſſe v. Bilſon*, *ib.*

11. In replevin, if the defendant avow at *a different place* to have return, he may plead in abatement, and traverſe the place laid in the declaration, *Creſſe v. Bilſon*, *ib.*

12. A defendant in replevin need not pray damages, either upon *an avowry* or *a plea*, *ib.*

13. If a ſheriff, or any perſon in his aid, make *replevin* after a claim of property notified to him, he is a treſpaſſer *ab initio*, *Leonard v. Stacey*, 140

14. In replevin, if the defendant plead that he was ſeiſed of the place WHERE, and juſtifies the taking *damage feaſant*, the plaintiff may alledge that *he* was ſeiſed of *a third part* of the place WHERE, and traverſe the *ſole ſeiſin* of the defendant, *Gilbert v. Parker*, 158

15. After a nonſuit in *replevin*, it is too late to object that the avowry ſtates a *particular eſtate*, without ſhewing its commencement, or a ſeiſin in fee, *Anonymous*, 223

REMAINDER.

See DEVISE, TAIL.

REQUEST.

1. Where material, 200. 227

2. Requeſt, how to be made; and difference when a time is appointed for doing a thing on requeſt, and when not, 260

RESCOUS.

1. The Court will not grant *an attachment* in the firſt inſtance on an *affidavit* of a *reſcue*; but if the ſheriff return a *reſcue*, that is of itſelf a *contempt*, and an attachment will go of courſe, *Anonymous*, 141

2. The Court will not grant an attachment for a reſcue, if it appear that the party was not legally arreſted, *Genner v. Sparks*, 173

3. In caſe of *reſcue* from *meſne proceſs*, the plaintiff muſt prove the original cauſe of action, the writ, the warrant, and a legal arreſt, *Wilſon v. Gary*, 211

4. In an action for a reſcue, the party reſcued is a competent witneſs, *Wilſon v. Gary*, *ib.*

5. In what manner an action for reſcuing a diſtreſs, contrary to the 2. Will. & Mary, c. 5. ſhall be laid and proved, *Dod v. Monger*, 215

6. If a landlord diſtrain goods for rent, and before replevin quit them for two or three intervening nights, the retaking

taking of them is not a reſcue contrary to 2. Will. & Mary, c. 5. *Dod v. Monger*, 216

7. Return of a *reſcous* quaſhed for repugnancy, *Reg. v. Weeks*, 220

RESTITUTION.

In what caſes a perſon ſhall or ſhall not have reſtitution of goods taken in execution, 297

RETRAXIT.

A *retraxit* muſt be made *in propriâ perſonâ*, 82

RETURN.

1. The validity of a cuſtom of the city of *London* to make a bye-law may be tried upon a return to a *habeas corpus* in an action for a falſe return, *Fazakerley v. Baldoe*, 177

2. Difference between proceedings begun in B. R. and proceedings brought up by *certiorari*, as to returns, 268

3. Writ of inquiry returnable *ad tres Trin.* which being *Sunday*, 148

4. Of *Sunday*, and the return-days, *ib.*

5. The calendar is ſettled by law, and part of it, 251, 252

6. If a writ may not be legally executed the day of the return, it ſhall not the next day, 159

7. Fifteen days between *teſte* and return of proceſs, 146

RIOT.

1. If a number of perſons meet peaceably on a *lawful occaſion*, and a ſudden affray happen between them, it cannot be made *a riot*; but if ſeveral meet upon an *unlawful occaſion*, and a ſudden affray happen between them, and a perſon who came upon a *lawful occaſion* join in the affray, it may make him a rioter as well as the reſt, *Anonymous*, 43

2. An inquiſition taken before two juſtices of peace for a riot, upon the 13. Hen. 4. c. 7. need not ſpecially purſue the words of the ſtatute, but may conclude generally *contra formam ſtatuti*, *Reg. v. Pugh*, 146

3. Juſtices of the peace enquire of riots under the ſtatute 13. Hen. 4. c. 7. and fine the offenders under 8. Hen. 6. c. 9. *Reg. v. Pugh*, 141

4. Juſtices of peace may take an inquiſition anywhere; but they muſt go to the place to record a conviction on view, and they muſt enquire and record within a month, *ib.*

5. Diſtinction between *a riot* and an *unlawful aſſembly*, *ib.*

S.

SCIRE FACIAS.

1. Two *ſcire facias* cannot be taken out with the ſame *teſte*, but with different returns; the one returnable within *fifteen days of St. Hilary*, and the other on the *morrow of the Purification*, *Jevon v. Turner*, 86

2. If a *ſcire facias* to revive a judgment againſt an executor mention firſt a day of appearance *coram nobis ubicunque*, and afterwards give day to the party to appear "*at the day aforeſaid at* WEST-"MINSTER, it is erroneous, and cannot be amended, *Anonymous*, 86

3. If a *ſcire facias* be brought againſt the maſter of the crown office, to enquire whether he ought to hold his office, he is, on iſſue joined thereon, intitled to a *trial at bar*, *Anonymous*, 123

4. Precedent of a *niſi prius* record in a *ſcire facias* brought by an adminiſtrator againſt the *terre-tenants*, with the pleadings thereon, *Adams v. Savage*, 133

5. The defendant is not intitled to coſts under the ſtatute of 8. & 9. Will. 3. c. 11. on a judgment in *ſcire facias* being arreſted, *Adams v. Savage*, 137

6. If a defendant has appeared to or pleaded in abatement of a *ſcire facias*, he ſhall have no coſts, *Pocklington v. Peck*, 137 *notis*

7. If a plaintiff ſue an executor and die inteſtate after *interlocutory judgment*, and before the execution of the *writ of enquiry*, the adminiſtrator may have a *ſcire facias ad audiendum judicium*, *Smith v. Harman*, 142

8. A judgment in *ſcire facias* againſt bail, that the plaintiff "do recover "his *damages* ſuſtained by occaſion of "the delay of execution," is erroneous; for by 8. & 9. Will. 3. c. 11. ſ. 3. the Court cannot award *damages*, but only *coſts of ſuit*, *Fanſhaw v. Morriſon*, 157

9. *Scire facias*, upon a recognizance ſtating that they or either of them *acknowledged* to owe forty pounds, to be raiſed of the goods, &c. of them or either of them, is good, *Fanſhaw v. Morriſon*, 197

10. On a *ſcire facias* againſt *terretenants* without naming them, if it be pleaded in abatement that *A.* is *terretenant*, and not ſummoned, the defendant ſhall not *anſwer over* till *A.* be ſummoned, but the writ ſhall not be abated, *Adams v. Savage*, 199

11. If an adminiſtrator bring a *ſcire facias* on a judgment by his inteſtate, to warn the tenants, and the ſheriff return ſeveral *terretenants*, they cannot all appear and plead in abatement jointly, *Adams v. Savage*, 226

12. If, on a *ſcire facias* againſt *terretenants*, the ſheriff return among others *John* and *Sarah* his wife as tenants, a plea in abatement that *G. T.* is tenant, is bad; for it is pleading "*non tenure*" by implication, *Adams v. Savage*, 226

13. A *ſcire facias* may be ſued out by any perſon who is injured by A PATENT as well as by the king, *Brewſter v. Weld*, 230

14. In what manner a *ſcire facias* out of chancery, to repeal letters patent, ſhall be returned, *Brewſter v. Weld*, *ib.*

15. In what caſe *terretenants* are eſtopped from taking advantage of a variance in *ſcire facias*, *Lezivan v. Lawrence*, 256

16. A *ſcire facias* to have execution on a judgment in ejectment of *two* meſſuages, when it was only for *one* meſſuage, cannot be amended after "*nul* "*tiel record*" pleaded, *Buxom v. Hoſkins*, 263. 310

17. If judgment be ſigned under an agreement to ſtay execution for *a year*, execution may, after the year, be taken out without a *ſcire facias*, but not if the ſtay be only for *three months*, and the execution afterwards hindered by injunction, *Booth v. Booth*, 288

18. The rule that a judgment above a year old muſt be revived by *ſcire facias* before execution can be taken out on it, explained, 288 *notis*

19. If *A.* obtain judgment againſt *B.* and ſue out a *fieri facias*, on which the ſheriff takes the goods of *B.* in execution, the debt is diſcharged by ſuch ſeizure; and if *A.* die after ſuch ſeizure, and the ſheriff be removed before the *ſale*, the ſucceeding ſheriff may compel his predeceſſor to ſell them; and therefore *B.* cannot ſue out a *ſcire facias* againſt *him*, to have reſtitution of the goods; for the death of *A.* does not abate the execution, *Clerk v. Withers*, 290

20. On a *ſcire facias* againſt bail, and "no *capias* againſt the principal" pleaded, A REPLICATION, ſhewing a *capias* ſued out after the expiration of a year and a day from the giving of the judgment, is good, although no *ſcire facias* appear, *Cholmley v. Veal*, 304. 305

SCOLD.

1. A *common ſcold* may be indicted; but the indictment muſt expreſsly charge the defendant with being a *common ſcold*, for this offence cannot be deſcribed by any other words, as *common ſlanderer*, &c. *Reg. v. Foxby*, 11

2. The puniſhment for a common ſcold is ducking, *ib.*

3. To a writ of error on a judgment for being a common ſcold, the defendant muſt aſſign error in perſon, *Reg. v. Foxby*, 178

4. *A Com-*

4. "*Communis rixa*" inſtead of *rixatrix* is error, *Reg. v. Foxby*, 239

SEAMEN.

In caſe of ſeamen's wages the duty does not ariſe from the *contract*, but from the *ſervice* done, 26

SECRETARY OF STATE.

If a perſon ſurrender, on proclamation, to the ſecretary of ſtate on a charge of miſdemeanor, the ſecretary may bind him to appear in the court of king's bench, but cannot oblige him to find ſureties for his good behaviour, *Reg. v. Tutchin*, 165

SESSIONS.

1. Power of the ſeſſions over a conſtable with reſpect to the return of a warrant of diſtreſs, *Morley v. Stacker*, 83

2. The ſeſſions, on articles exhibited purſuant to 1. Will. & Mary, c. 21. ſ. 6. may enquire into *exceſſive fines* taken by a clerk of the peace, *Reg. v. Baines*, 192

3. Other juſtices than thoſe who conſtitute the ſeſſions where articles are exhibited againſt a clerk of the peace may proceed to enquire into the truth of the charges, and amove him, *Reg. v. Baines*, *ib.*

4. A *mandamus* does not lie to the ſeſſions commanding the juſtices to ſtate a *ſpecial caſe*, *Peat's Caſe*, 229

5. The ſeſſions have no power by 22. *Hen.* 8. c. 5. with reſpect to a *private bridge* not common on a highway, unleſs it become a *public nuiſance*, *Reg. v. Saintiff*, 256

6. The ſeſſions may vacate an order made in the ſame ſeſſions, *St. Clement's v. St. Andrew's*, 287

7. If the ſeſſions make an order directly contrary to an order before made in the ſame ſeſſions, the laſt order ſhall prevail, although there be no expreſs words of repeal in it, *St. Clement's v. St. Andrew's*, 287

8. The ſeſſions cannot make *an order* for the repairs of a highway; for they have no juriſdiction but upon *preſentment*, *Reg. v. Wells*, 307

SEVERANCE.

See ERROR.

SHERIFF.

1. An action lies againſt the ſheriff as returning officer, for refuſing to receive the poll of a legal voter at the election of a member of parliament, *Aſhby v. White*, 46

2. An action will not lie againſt a ſheriff for taking inſufficient bail, *Groſvenor v. Soames*, 122

3. Treſpaſs lies againſt a ſheriff for making a replevin after claim of property notified to him, *Leonard v. Stacey*, 140

4. In an action of debt againſt a ſheriff for permitting an eſcape, the indorſement of *non eſt inventus* on the *ca. ſa.* is ſufficient evidence of its having been delivered to him, *Blatch v. Archer*, 152 *notis*

5. So the bailiff's name indorſed on the writ is ſufficient evidence that he was authorized by the ſheriff without proving the warrant, *Blatch v. Archer*, 152 *notis*

6. A ſheriff cannot juſtify receiving any perſon who is brought to him in illegal cuſtody, for he is not bound to receive a priſoner from anybody but from *a conſtable* or other *peace-officer*, *Rich v. Doughty*, 154

7. A ſheriff's officer is protected by the law in the due execution of his duty, *Genner v. Sparks*, 174

8. The ſheriff has no authority to take *a bond* for the appearance of perſons arreſted by him under proceſs iſſuing upon an indictment at the quarter-ſeſſions for a miſdemeanor; he can only take *a recognizance* for their appearance, *Bengough v. Reſſiter*, 179 *notis*

9. By 20. Geo. 2. c. 37. ſheriffs ſhall, at the expiration of their office, turn over

over to the ſucceeding ſheriff, by indenture and ſchedule, all writs and proceſs unexecuted, and all priſoners in his cuſtody, 183 *notis*

10. A ſheriff is not liable for an eſcape until the priſoner has been regularly delivered over to him by his predeceſſor, 183, *notis*

11. If a *fieri facias* be taken out, and the goods levied, before judgment entered on the roll, and another *fieri facias* is delivered to the ſheriff upon another judgment, to which he returns *nulla bona*, and then the goods are ſold under the firſt writ, and ſatisfaction entered, but the roll not filed; the Court will not, on an action brought by the *ſecond plaintiff* againſt the ſheriff for a *falſe return*, give the *firſt plaintiff*, who had indemnified the ſheriff, leave to file his roll, *Herring v. Crocker*, 184

12. An *under-ſheriff* ought not to act as an attorney while he is under-ſheriff, *Anonymous*, 191

13. If *A.* obtain judgment againſt *B.* and ſue out a *fieri facias*, on which the ſheriff takes the goods of *B.* in execution, the debt is diſcharged by ſuch ſeizure; and if *A.* die after ſuch ſeizure, and the ſheriff be removed before *the ſale*, the ſucceeding ſheriff may compel his predeceſſor to ſell them; and therefore *B.* cannot ſue out a *ſcire facias* againſt *him*, to have reſtitution of the goods; for the death of *A.* does not abate the execution, *Clerk v. Withers*, 290

SHIP.

1. If a captured ſhip be retaken upon *freſh purſuit*, though after a week's time, the property in her is not changed by the capture, but remains in the firſt owners, by HOLT, *Chief Juſtice*, *Watſon v. Trantor*, 12

2. If a ſhip has been legally *hypothecated*, the ſhip remains liable to anſwer the money borrowed, into whoſe hands ſoever ſhe may come, 12

SLANDER.

See CASE (ACTION ON THE).

STATUTES.

1. Where a ſtatute takes notice of a common-law offence, and adds a further penalty, an indictment thereon may well conclude *contra formam ſtatuti*, *Reg. v. Bethel*, 17

2. If a ſtatute give juſtices of the peace a power generally to determine a matter at the ſeſſions, they cannot determine but as a court of juſtice, and according to the rules of law, 17

3. If a ſtatute command an act to be done, or prohibit the doing of it for the advantage of any perſon, that perſon ſhall impliedly have remedy at law to recover the advantage given to him, or to have ſatisfaction for the injury done him by diſobeying the directions of the ſtatute; and therefore by the ſtatute of Wills, 32. Hen. 8. c. 1. if money be deviſed out of lands, the deviſee ſhall have an action of debt againſt the owner of the lands to recover it, *Anonymous*, 27

4. The miſrecital of *the title* of a ſtatute is immaterial; for the title is no part of the ſtatute, *Mills v. Wilkins*, 63

5. A penal ſtatute, ordering the penalty to be levied on the goods of the offender *by diſtreſs*, ſhall be conſtrued to mean by diſtreſs *and ſale*, *Morley v. Stacker*, 83

6. The ſtatute 8. and 9. Will. 3. c. 11. reſpecting coſts on a *ſcire facias*, does not extend to *execution* or *adminiſtration*, *Adams v. Savage*, 137

7. A ſtatute inflicting a leſs puniſhment is a virtual repeal of a ſtatute inflicting a greater puniſhment on the ſame crime, *Rex v. Cator*, 142 *notis*

8. If a ſtatute declare, "that the ſkins "of ſheep being tanned or tawed, "and every ſalt-hide, ſhall be reputed "and taken to be *leather*;" and there are two kinds of tawing, the one dry, which leaves the fur upon the ſkin, and the other wet, which takes it off by a preparation of ſalt and allum; a ſheep-ſkin prepared with white allum is *leather* within the meaning of the ſtatute, *Sadlers Company v. Jones*, 166

9. If a ſtatute enact, "that whoſoever "ſhall not make the wares belonging "to ſadlery ſufficiently and ſubſtan-"tially, ſhall be liable to ſuch a pe-"nalty," and deſcribe the manner in which the leather ſhall be made, *a ſadler* who uſes leather not dreſſed according to the ſtatute is not liable to the penalty, if *the buyer* is ſatisfied with the commodity, *Sadlers Company v. Jones*, 166

10. When a ſtatute gives a penalty to the king and the informer, and the informer does not ſue within the year, the king may ſue for the whole penalty at any time within two years, *Reg. v. Franklin*, 220

EDWARD THE THIRD.

14. Edw. 3. c. 6. (Amendment), 269. 277. 280

25. Edw. 3. c. 5. (Replevin), 84, 85

RICHARD THE SECOND.

5. Rich. 2. c. 7. (Forcible Entry), 96

HENRY THE FOURTH.

13. Hen. 4. c. 7. (Riot), 140, 141

HENRY THE SIXTH.

8. Hen. 6. c. 9. (Forcible Entry), 274

——— c. 12. (Amendment), 270. 277

23. Hen. 6. c. 9. (Bail-Bonds), 179

——— (Sheriffs), 122

——— c. 14. (False Return), 47

HENRY THE EIGHTH.

14. & 15. Hen. 8. c. 5. (Phyſicians), 44

22. Hen. 8. c. 5. (Bridges), 256

23. Hen. 8. c. 15. (Coſts), 92

27. Hen. 8. c. 16. (Inrollment), 248

32. Hen. 8. c. 1. (Wills), 110

——— c. 34. (Aſſignee), 194

——— c. 9. (Subornation), 202

33. Hen. 8. c. 1. (Frauds), 62. 105

——— c. 12. (Palace-Court), 75

EDWARD THE SIXTH.

5. & 6. Edw. 6. c. 16. (Offices), 235

QUEEN ELIZABETH.

1. Eliz. c. 2. (Pariſh-Church), 189

5. Eliz. c. 4. (Labourers), 91. 204

——— c. 4. (Trade), 69. 128

——— c. 4. (Penal Statute), 220

——— c. 9. (Perjury), 202

13. Eliz. c. 10. (Biſhops' Leaſes), 64

18. Eliz. c. 3. (Baſtards), 104

——— c. 14. (*Jeofaile*), 150

27. Eliz. c. 5. (Pleading), 117

29. Eliz. c. 6. (Recuſant), 239

39. Eliz. c. 4. (Vagrants), 240

43. Eliz. c. 2. (Poors Rate), 214

——— (Overſeers), 77. 98. 164

——— (Apprentice), 164

JAMES THE FIRST.

1. Jac. 1. c. 22. (Leather), 166

3. Jac. 1. c. 5. (Recuſant), 239

7. Jac. 1. c. 7. (Penal Statute), 41

21. Jac. 1. c. 16. (Limitations), 26. 240

CHARLES THE SECOND.

13. Car. 2. c. 2. (Bail), 266

16. & 17. Car. 2. c. 8. (Amendment), 2. 273. 275.

17. Car. 2. c. 8. (Adminiſtrator), 290. 293. 296

22. Car. 2. c. 1. (Conventicles), 229

22. & 23. Car. 2. c. 9. (Coſts), 253

29. Car. 2. c. 3. (Sale), 168

——— c. 3. (*Autre Vie*), 64

——— c. 3. (Frauds), 65

——— c. 3. (Collateral Promiſe), 249

30. Car. 2. c. 7. (Adminiſtrators), 126

WILLIAM AND MARY.

1. Will. & Mary, c. 21. (Clerk of the Peace), 192

——— c. 18. (Toleration), 229

2. Will. & Mary, c. 5. (Diſtreſs), 216

3. & 4. Will. & Mary, c. 10. (Diſtreſs), 83

——— (Deer), 104

4. & 5. Will. & Mary, c. 11. (Game), 40
——— c. 23. (Game), 57
5. & 6. Will. & Mary, c. 11. (*Certiorari*), 43. 246
7. & 8. Will. & Mary, c. 7. (Double Return), 47
8. & 9. Will. & Mary, c. 11. (Pleading), 88
——— c. 33. (Recognizance), 43
——— c. 11. (Costs), 137. 153
——— c. 27. (King's Bench), 57
——— c. 11. (Frivolous Suits), 142
——— c. 18. (Composition), 58. 157
——— c. 11. (*Scire Facias*), 157
——— c. 30. (Apprentices), 164
——— c. 25. (Hawkers and Pedlars), 240
9. & 10. Will. & Mary, c. 17. (Proteſt), 81

QUEEN ANNE.

1. Anne, c. 6. (Eſcape Warrant), 154. 254
——— c. 18. (Bridges), 307
3. & 4. Anne, c. 9. (Bills), 30. 37. 148
4. Anne, c. 16. (View), 265
——— (Limitation), 26
4. & 5. Anne, c. 16. (Bond), 11. 61. 102. 229
——— (Dilatory Plea), 146. 175
5. Anne, c. 9. (Eſcape Warrant), 22. 95
10. Anne, c. 3. (Diſſenters), 229
——— c. 18. (Crown Leaſes), 248

GEORGE THE FIRST.

9. Geo. 1. c. 15. (Under Sheriffs), 183
5. Geo. 1. c. 13. (Amendment), 310
9. Geo. 1. c. 7. (Pariſh Accounts), 97
12. Geo. 1. c. 29. (Bail), 268

GEORGE THE SECOND.

11. Geo. 2. c. 19. (Diſtreſs), 216
14. Geo. 2. c. 17. § 14. (Notice of Trial), 18
——— c. 39. (Occupants), 64
17. Geo. 2. c. 38. (Poors Rate), 214
——— (Pariſh Books), 187
——— (Regiſter Book), 97
20. Geo. 2. c. 37. (Priſoners), 183
26. Geo. 2. c. 33. (Marriage), 256
27. Geo. 2. c. 17. (Gaoler), 57
30. Geo. 2. c. 24. (Falſe Pretence), 62. 105

GEORGE THE THIRD.

18. Geo. 3. c. 19. (Conſtables Accounts), 97
20. Geo. 3. c. 19. (Servants), 205
22. Geo. 3. c. 25. (Ranſom), 13
31. Geo. 3. c. 32. (Papiſts), 140
32. Geo. 3. c. 57. (Apprentices), 164

SUMMONS.

Where neceſſary in order to a conviction, 42

SUNDAY.

1. A priſoner who has eſcaped may be retaken on *a Sunday*, either by the officer on *freſh purſuit*, or by virtue of an *eſcape warrant*, 95

2. But if *A.* be arreſted at the ſuit of *B.* and diſcharged, by the ſheriff's not knowing that there was *a detainer* againſt him in his office at the ſuit of *C.* and be arreſted on the *Sunday* following at the ſuit of *C.* he ſhall be diſcharged by the 29. Car. 2. c. 7. for this is an original taking, and not a retaking after an eſcape, *Atkinſon v. Jameſon*, 95 *notis*

3. If a bailiff arreſt a perſon without a warrant on *a Sunday*, and detain him by virtue of a warrant procured the enſuing day, the Court will grant an *attachment* againſt the officer, but will not diſcharge the priſoner, for he may have an action againſt the officer for falſe

false imprisonment, *Lidford v. Thomas*, 96

4. The ecclesiastical courts may proceed on the statute 1. Eliz. c. 2. s. 14. against a man for not going to his parish-church on a *Sunday*, *Sutton v. Standish*, 188

5. If a writ of enquiry be made returnable *tres Trinitatis*, and the return-day happen to be *Sunday*, it is bad, and cannot be executed on the *Monday*, *Harvey v. Broad*, 148. 159. 196

6. Same point, *Davy v. Salter*, 251

7. A fine is erroneous if any of the proclamations are on a *Sunday*, *Fish v. Brochet*, 196

8. Bail may take their principal on a *Sunday*, to surrender him in discharge of their recognizance, *Anonymous*, 231

SUPERSEDEAS.

A writ of *certiorari* is no *supersedeas* unless bail be given pursuant to the statute, *Reg. v. Bethel*, 33

SURPLUSAGE.

1. In trespass for throwing down rails, and entering *a wharf*, if the defendant plead that *A.* was possessed of *the wharf* under a lease then unexpired, and had *a way* from thence over the *locus in quo*, and underlet the same to the defendant, with *all ways*, &c. necessary to the enjoying of the same, and that he the defendant had no other way to the *terminus ad quem*, the allegation "that the defendant "had no other way, &c." is surplusage, *Staple v. Heydon*, 1

2. In replevin, if a demurrer to a repleader to a plea in bar conclude, "Wherefore, as before, he prays "judgment, *and that the declaration* "*may be quashed*," these last words may be rejected as surplusage, *Crosse v. Bilson*, 102

3. If a judgment be given at *Westminster*, which makes *bona notabilia* in *Middlesex*, and the administrators of the plaintiff declare in a *scire facias* on the judgment, upon letters of administration granted "by the archdeacon "of *Dorset*," these words cannot be rejected as *surplusage*, although without them the declaration would be good, *Adams v. Savage*, 135

SURRENDER.

If the custom of a manor be that the lord may grant copyhold estates "to "three persons, *habendum* to them successively as they shall be named, "and not otherwise," A SURRENDER to *A.* for his own life and the lives of *B.* and *C.* is warranted by the custom, *Smartle v. Penhallow*, 63

T.

TAIL.

1. Where and how issue in tail may falsify a recovery, 296

2. Where plaintiff must make title, and where he need not, 213

TALES.

On the trial of indictments and informations, neither the defendant nor the prosecutor can pray a *tales* without a warrant from the attorney-general, *Reg. v. Banks*, 246

TAXES.

See COLLECTOR—INDICTMENT.

TIME.

1. If a warrant of attorney to compel a judgment be given under a parol agreement that execution shall not be taken out for *a year*, *quære* how the year shall be reckoned, *Dillon v. Brown*, 14

2. In covenant by a master against his apprentice for leaving his service on such a day, if the apprentice plead a licence for his absence on that day, the time is material, and therefore the master cannot give in evidence an absence

abſence on another day, *Anonymous*, 70

3. If a day that is not material be laid in a declaration, and the defendant, by his plea, make it material, and then the plaintiff, in his replication, varies from the day in the declaration, it will be a departure; otherwiſe, if the day had not been made material by the plea, *Anonymous*, 115

TITHES.

1. Land, though uncultivated, yet if it yield a profit, as in wood, ſlate, &c. is tithable, *Horner v. Bonner*, 96

2. No tithe is due for *fiſh* or *wood*, of common right, but they are both tithable by cuſtom, *Anonymous*, 223

3. *Quære*, whether it be a good *modus* to pay from *April* to *November* every tenth day's milk, ſkimmed and made into cheeſe, in lieu of all tithe-milk, *Leiceſter v. Foy*, 261

TRADE.

1. A bye-law made by a corporation, that no butcher ſhall ſlaughter any beaſts within the walls of the city, is good, for it is not in reſtraint, but in regulation of the trade, *Peirce v. Bartrum*, 124 *notis*

2. If a power be granted by charter to a company exerciſing a particular trade in a particular place, to make bye-laws for the government of all perſons exerciſing that trade in that place, the company is enabled to make bye-laws, binding as well on perſons exerciſing that trade who are *not members of the company*, as on thoſe who are, *Butchers' Company v. Mercey*, 124 *notis*

TRAVERSE.

See PLEADING.

TRESPASS.

1. In treſpaſs for throwing down rails and entering *a wharf*, if the defendant plead that *A.* was poſſeſſed of *the wharf* under a leaſe then unexpired, and had *a way* from thence over the *locus in quo*, and underlet the ſame to the defendant, with *all ways*, &c. neceſſary to the enjoying of the ſame, and that he the defendant had *no other way* to the *terminus ad quem*, the allegation "that the defendant had no "other way, &c." is *ſurplusage*, and an iſſue taken thereon is an *immaterial iſſue*, *Staple v. Heydon*, 1

2. In treſpaſs for taking "two *cows* at "*A.* and alſo a *load of wheat*, the "goods of the plaintiff there found," the words "*the goods of the plaintiff*" refer only to *the wheat*; and therefore the treſpaſs for taking the *two cows* is ill laid, inaſmuch as the declaration does not ſtate that *they* were the goods of the plaintiff, *Joſe v. Mills*, 15

3. An indictment for a treſpaſs, although it ſhew in the deſcription of the offence that the defendant acted as an *acceſſary*, and not as a *principal* in the commiſſion of the offence, is good; for in *treſpaſs*, as well as in *treaſon*, all perſons concerned in the offence are principals, and the charge may be laid either way, *Reg. v. Tracy*, 33

4. Treſpaſs for breaking the plaintiff's cloſe, treading down his graſs, and hunting and killing his rabbits, on *divers days and times* from ſuch a time to ſuch a time, with a *continuando* of the ſaid treſpaſs as to all the particulars, is good; for although one act cannot be continued from one day to another, yet an act may be daily continued, *Monkton v. Aſhley*, 38

5. If *A.* defraud *B.* of goods, and ſell them to *C.* and *B.* after notice that *C.* claims property therein, replevy them, *C.* may bring treſpaſs for the taking, *Leonard v. Stacey*, 69

6. In *treſpaſs* for making a *replevin* after notice of a claim of property, *the notice* only is in iſſue, *Leonard v. Stacey*, *ib.*

7. If treſpaſs be againſt two or more, and one *demur*, and another plead *to iſſue*, the damages aſſeſſed upon *the iſſue* ſhall affect him that *demurred*, if the demurrer be ruled againſt him, *Leonard v. Stacey*, *ib.*

8. If

8. If treſpaſs be for breaking a houſe and entering a cloſe againſt one who pleads *not guilty* as to the one and demurs as to the other, the jury muſt find damages ſeverally, 69

9. Perſons concerned only as appraiſers in making a wrongful replevin are treſpaſſers, *Leonard v. Stacey*, *ib.*

10. In treſpaſs for breaking and entering the plaintiff's houſe, and carrying away his goods, if the defendant plead *not guilty* as to the *breaking*, and *juſtify* the *entering* by virtue of proceſs from an inferior court, but ſay nothing as to the carrying away; *quære*, if good, *Brigs v. Collingſon*, 71

11. The bailiff of an inferior court, who abuſes the proceſs of the court, is a treſpaſſer *ab initio*, *Brigs v. Collingſon*, *ib.*

12. A conviction on an indictment of larceny may be pleaded in bar to an action of treſpaſs for taking the ſame goods, *Luttrel's Caſe*, 77

13. Treſpaſs laid in the time of *King William*, and againſt the peace of *Queen Anne*, is bad on demurrer, but good after verdict, *Day v. Muſket*, 80

14. A maſter may bring treſpaſs for ſeducing his ſervant to leave his ſervice, although ſuch ſervant is only retained as a *journeyman*, *Hart v. Aldridge*, 101 *notis*

15. If bailiffs break open doors to execute proceſs, the party injured may have an action of *treſpaſs* againſt them; but the Court will not grant an *attachment* againſt them, unleſs it appear to have been in abuſe of the proceſs of the law, *Anonymous*, 105

16. In treſpaſs *vi et armis* for taking the plaintiff's goods in *Dale*, the defendant cannot plead, in juſtification, generally, that the place WHERE is his freehold, and that the goods were then *damage feaſant*, *Elwis v. Lombe*, 117

17. A record of treſpaſs *vi et armis* is not removed by a writ of error on a judgment in an action of treſpaſs *on the caſe*, *Keni's Caſe*, 138

18. Treſpaſs lies againſt a ſheriff, or thoſe who act in his aid, for making a *replevin* after notice of a claim of property, *Leonard v. Stacey*, 140

19. In treſpaſs, the amount of the damages muſt be ſtated and proved, *Dove v. Smith*, 153

20. The ſtatute of 8. and 9. Will. 3. c. 11. only excludes accidental treſpaſſes from full coſts, *Dove v. Smith*, *ib.*

21. In treſpaſs, the *right* cannot be given in evidence on *not guilty*, *ib.*

22. If a vendor ſell goods by ſample, to be delivered to the vendee within a month, and take earneſt, and within a month ſend them by his ſervant to the premiſes, and when part are unloaded the reſt are diſtrained for toll, the delivery is complete ſo as to intitle the vendee to bring *treſpaſs* for the ſeizure, *Blakey v. Dinſdale*, 162 *notis*

23. If an account be ſtated between *A.* and *B.* by which it appears that *A.* is indebted to *B.* in ſuch a ſum, and *A.* ſigns the account, and afterwards by falſe and ſiniſter inſinuations gets it into his hands and tears it, he is a treſpaſſer, *Reg. v. Criſp*, 175

24. An indictment will not lie for a *bare treſpaſs*; for the words *vi et armis* alone are not ſufficient; but there muſt be ſuch an actual force as implies a *breach of the peace*, to make a *treſpaſs* an indictable offence; and this degree of actual force muſt appear on the face of the indictment, 175 *notis*

25. Treſpaſs lies for taking a ſervant from his maſter, *Reg. v. Darnel*, 181

26. Formerly, if a landlord diſtrained barrels of beer for rent, and drew the beer out of the barrels, he was conſidered as a treſpaſſer *ab initio*, *Dod v. Monger*, 216

27. But now by 11. Geo. 2. c. 19. ſ. 20. diſtreſſes for rent ſhall not be deemed unlawful for any irregularity afterwards, nor the party deemed a treſpaſſer *ab initio*; but the parties grieved thereby may recover ſatisfaction for the

the ſpecial damage, and no more, on an action of treſpaſs or on the caſe, 216 *notis*

TRIAL.

1. If, after iſſue joined, no proceedings by the plaintiff be had for *four Terms*, the defendant is intitled to a Term's notice of trial, and the Term in which the iſſue is joined is *incluſive*; but notice at any time within *the year*, though countermanded, is a notice within four Terms, *Anonymous*, 18

2. By 14. Geo. 2. c. 17. ſ. 4. no cauſe ſhall be tried at *niſi prius*, or at the Sittings in *London* or *Weſtminſter*, where the defendant reſides above *forty miles* from the ſaid cities reſpectively, unleſs notice of trial in writing has been given at leaſt ten days before ſuch intended trial, *ib.*

3. The practice is, if the defendant live within forty miles of *London*, and the *venue* is laid either in *London* or *Middleſex*, that eight days notice of trial, excluſive of the day, is to be given, *ib.*

4. But if the defendant live above forty miles from *London*, and the cauſe is to be tried in *London* or *Middleſex*, fourteen days notice muſt be given, purſuant to the ancient practice, *Anonymous*, *ib.*

5. The notice to be given within the four Terms muſt be given within the laſt Term *ſedente Curiâ*, 19

6. After a ſecond trial, it is not fit that *a new trial* ſhould be granted merely becauſe the Judge who tried the cauſe is diſſatisfied with the verdict, *Anonymous*, 22

7. A *new trial* ought not to be granted for want of evidence which the party might have had at the trial; but if it be proved that endeavours were uſed to procure the witneſſes, and that they were prevented by ſome unforeſeen accident from attending, the abſence of ſuch witneſs, if material, may be a good cauſe to grant a new trial, *Warren v. Furr*, *ib.*

8. The maſter of the crown office, upon a *ſcire facias*, and iſſue joined thereon, is intitled to a *trial at bar*, *Anonymous*, 123

9. An indictment againſt *ſeveral* for a miſdemeanor may be tried againſt *ſome* of the defendants only on their entering into a rule to plead *guilty*, if their co-defendants are convicted, *Reg. v. Middlemore*, 212

10. A *new trial* is never granted for want of evidence whereof the party was apprized, and which he might have had at the trial, *Anonymous*, 222

11. The miſdirection of the Judge who tries a cauſe, and his refuſing to admit good evidence, are, reſpectively, good grounds for a new trial, *Anonymous*, 242

12. On the trial of indictments and informations, neither the proſecutor nor the defendant can pray *a tales* without a warrant from the attorney-general, *Reg. v. Banks*, 246

13. In civil actions the defendant cannot carry down a cauſe to trial by proviſo until after default in the plaintiff, except in ſpecial caſes, as in *quare impedit*, in *replevin*, in *prohibition*, &c. where the defendant is in ſome reſpect in the nature of a plaintiff, *Reg. v. Banks*, *ib.*

14. By 7. & 8. Will. 3. c. 32. when a defendant is intitled to carry down a cauſe to trial by proviſo, he may in the preceding iſſuable Term ſue out a new *venire* by proviſo, and proſecute the ſame by *habeas corpora* or *diſtringas*, with a *niſi prius*, &c. 246 *notis*

15. But ſince 14. Geo. 2. c. 17. which gives a defendant judgment, as in caſes of nonſuit, where a plaintiff does not proceed to trial according to the rules of the court, the trial by proviſo has fallen into diſuſe, 246 *notis*

16. There cannot be a trial by proviſo in the king's caſe, becauſe there can be no laches in the king, *Reg. v. Banks*, 247

17. In indictments and informations the trial muſt be at bar, unleſs the attorney-general will grant a *niſi prius*, *Reg. v. Banks*, 247

18. The

18. The Court will grant a *new trial* on account of THE PANEL having been improperly returned, *Gree v. Sharp*, 265

19. It is a good ground to grant a *new trial*, that the Judge who tried the cause over-ruled good or admitted bad evidence, although the other party have remedy by *bill of exception*, *Reg. v. Wills*, 307

20. An indictment for not repairing a county bridge shall, on suggestion that the whole county is interested, be tried in the next adjoining county, *Reg. v. Wills*, *ib.*

TROVER.

1. There must be special bail filed in an action of trover and conversion, *Bangley v. Titcombe*, 14

2. If an apprentice be pressed and earn prize-money or wages for which he receives *seamen's tickets*, the master may bring *trover* to recover these tickets from any person into whose hands they may be passed; for the possession of the apprentice is the possession of the master, who has the right of property, *Barker v. Dennis*, 69

3. Trover will not lie to recover goods from a person who has been convicted on an indictment for stealing them feloniously, *Lutterel's Case*, 71

4. Trover lies by an executor to recover money taken out of the testator's room after his death, *Clark v. Denley*, 151

5. Trover lies for trees planted in boxes in a garden, *Olive v. Vernon*, 170

6. In trover, a demand of goods by, and a refusal to restore them to, the right owner, is not merely an evidence but an actual conversion of them, *Baldwin v. Cole*, 212

V.

VAGRANT.

A vagrant as such is not indictable, 240

VARIANCE.

1. In debt on a recognizance in the common pleas, if the declaration state it as taken before SIR GEORGE TREBY *et sociis suis*, and it appears to have been taken before another Judge at chambers, and by him delivered to the Court, *the variance* is fatal, *Chetley v. Wood*, 43

2. In an action on a bail bond, if the writ be *in placito transgressionis ac etiam billæ*, and the bond be to appear in a *plea of trespass* only, the variance is immaterial, *Grosvenor v. Soame*, 122

3. If, on a judgment in *Wales*, the *placitum*, on a writ of error, state it to be "at a great session of our lord *the* "*king*, holden before *A.* and *B.* jus-"tices of our lady *the queen*," the judgment is erroneous, *Lewis v. Jones*, 138

4. If a plaint in an inferior court be at the suit of *C. F.* generally, and the declaration be at the suit of *C. F. executor*, the variance, though fatal before, is cured by the verdict, *Hale v. Clare*, 150

5. If an indictment for perjury, in reciting the record of the trial, state a fact as happening between *A. B.* and *C.* and it appears, from the record produced in evidence, that the fact happened between *A.* and *B.* only, the variance is fatal, *Reg. v. Carter*, 168

6. "*Barnep*" for "*Barnap*," and "*ori-*"*entati*" for "*orientali*," are fatal variances between an indictment for perjury and the record after trial, *Reg. v. Carter*, *ib.*

7. If a declaration for a malicious arrest state, that the charge in the warrant was that "*he intended to rob*," and, on the production of the warrant, the charge appears to be, that "he in-"tended to rob *as he believes*," the variance is immaterial, *Muriel v. T.* 170

8. In an action on 2. Will. & Mary, c. 5. for rescuing a distress, if the declara-

ration ſtate a leaſe "*for a year and ſo* "*from year to year,*" and the leaſe produced in evidence be "for a year "and ſo from year to year *as long as* "*both parties pleaſe,*" the variance is fatal, *Dod v. Monger*, 215

9. In an action for a malicious proſecution, if the indictment be recited "according to the *ſubſtance* follow-"ing," a variance of "*valetis*" inſtead of "*valentia*" is immaterial; but if the recital had been *in hæc verba*, the variance would be fatal, *Johnſon v. Browning*, 216

10. If on error on a judgment *pro debito et damnis*, A RELEASE be pleaded, reciting the judgment to be *pro debito et damnis ultra miſis et cuſtagiis*, the variance is not material, *Davenant v. Raſter*, 236

11. Judgment is obtained in debt on bond in *Michaelmas Term*; a *ſcire facias* is brought thereon againſt the *terre-tenants* returned; and on "*nul* "*tiel record*" pleaded, judgment is given for the plaintiff, and an *elegit* ſued out; an ejectment is brought upon the *elegit*, and it is found by ſpecial verdict, that the *ſcire facias* recited a judgment of *Trinity Term*: this, if diſcovered on the trial of the iſſue of "*nul tiel record*," muſt have prevailed as a *failure of record*; but the fact having been judicially tried and aſcertained, the *terre-tenants returned* are eſtopped, by the award of execution on the judgment in the *ſcire facias*, from taking advantage of this VARIANCE; and ſo are the *terre-tenants not returned*, if they do not ſhew a title paramount to the judgment in the *ſcire facias*, *Trevivan v. Lawrence*, 256

12. If a writ of error be brought on a judgment in ejectment, and, on neglect to aſſign error, the defendant bring a *ſcire facias quare executionem non*, and recite the judgment to be of *two* meſſuages when it was only of *one* meſſuage the variance cannot be amended after "*nul tiel record*" pleaded, *Buxton v. Heſkins*, 263

VENDOR AND VENDEE.

1. If a man go to a merchant, and by falſe inſinuations and account of himſelf, prevail with the merchant to ſell him goods upon *credit*, yet the *property* continues in the *vendor*, although the *vendee* obtain poſſeſſion, *Anonymous*, 114

2. But if goods are obtained by falſe pretences, and procured without notice of the fraud, and on the offender being convicted of the cheat, the original owner get poſſeſſion of his goods again, the pawnbroker may maintain *trover* againſt him to recover them back, 114 *notis*

3. The draft of a third perſon given by a vendee to a vendor in payment, will not diſcharge the debt, if the drawee is not to be found, and the holder uſe due but ineffectual diligence to get it paid, *Popley v. Aſhley*, 147

4. If a bargain be made and earneſt given, without any expreſs agreement that payment is to be made at a certain time, the money muſt be paid before the goods are removed, *Langford v. Tyler*, 162

5. The vendee cannot demand delivery of goods bought, without tendering payment, *Langford v. Tyler*, *ib.*

6. After earneſt given, the vendor cannot ſell to another; but if the vendee do not come and take the goods, the vendor ought to requeſt him to pay, and if he do not come in a convenient time, the agreement is diſſolved, and the vendor may ſell, *Langford v. Tyler*, *ib.*

7. If a vendor ſell goods by ſample to be delivered to the vendee within a month, and take earneſt, and within a month ſend them to the premiſes, and when part are unloaded, the reſt are diſtrained for toll, the delivery is complete, ſo as to intitle the vendee to bring treſpaſs for the ſeizure, *Blakey v. Dimſdale*, 262 *notis*

VENIRE.

1. If a *venire* be, by miſtake, put to a wrong record, the Court will *ex officio* order it to be ſet right, *Reg. v. Warden of the Fleet*, 18

2. On an indictment in *Middleſex*, the *venue* may be made returnable *de die in diem*, *Reg. v. Tracy*, 179

3. On an information againſt a county for not repairing a bridge, the attorney-general may try the cauſe in any adjacent county, and award the *venire* either to the body of that county, or to *the vicinity* of any particular place therein, *Reg. v. Wells*, 191

4. The *venire* on indictments removed into the king's bench by *certiorari*, muſt be returnable on a *common day*, *Reg. v. Tutchin*, 268

VENIRE DE NOVO.

1. A *venire de novo* ſhall iſſue if a jury find *aſſets* without finding to what amount, *Staple v. Heydon*, 3

2. If a *venire de novo* be granted on an indictment after a *miſtrial*, the defendant muſt enter into a new recognizance, *Reg. v. Tracy*, 179

VENUE.

1. If a feoffment be pleaded in ſatisfaction of a bond, the acceptance muſt be laid in the county where the feoffment was made, *William v. Farrow*, 82

2. If a releaſe be pleaded, but no *venue* laid, it cannot be amended after demurrer, and joinder entered on the roll, *Anonymous*, 84

3. An indictment for perſuading a ſervant to purloin his maſter's goods, muſt lay a *venue* in the place where the perſuaſion was uſed, *Reg. v. Daniel*, 101

4. In debt on bond, if the defendant plead in diſability, that the plaintiff received the order of knighthood, and thereupon ought to ſue by that addition, it is not neceſſary to lay a *venue* where he was dubbed a knight; for every thing that concerns the condition of the perſon ſhall be tried where the action is brought, *Leet v. Mills*, 106

5. In *aſſumpſit*, if the declaration be delivered of *Eaſter Term*, the Court will not in *Trinity Term* change the *venue* from *Staffordſhire* to *London* upon the common affidavit, without an additional affidavit of the time when the declaration was delivered, *Crokei's Caſe*, 175

6. If an indictment for a conſpiracy againſt ſeveral charge the acts of ſome of the defendants in the pariſh of *St. Giles* in *Middleſex*, and of the others in the pariſh of *St. Margaret's* in the ſame county, and a *venue* be awarded to *St. Giles* only, it will be a *miſ-trial*, for the jury ought to come from both pariſhes, *Reg. v. Tracy*, 179

7. If a cauſe of action ariſe part in one county and part in another, the *venue* may be laid in either, *Anonymous*, 182

8. In what caſes the *venue* may be changed, *Anonymous*, *ib.*

9. The *venue* in ejectment muſt be where the land lies, *Anonymous*, 222

10. Same point, *Gree v. Sharp*, 265

11. If a bond bear date at any place *abroad*, that *place* muſt be ſtated in the declaration, with a *viz.* in ſuch a place in *England*, *Robert v. Harnage*, 228

12. The Court will change the *venue* in an indictment for not repairing a county bridge, on a ſuggeſtion that the whole county is intereſted, *Reg. v. Mills*, 307

VERDICT.

1. If a jury do not find *aſſets* to a certain value, the verdict is inſufficient, and a *venire de novo* ſhall iſſue, 40. *Edw.* 3. *pl.* 15. 3

2. If a jury find the point in iſſue, the verdict ſhall not be vitiated by finding a ſo ſuperfluous matter, *Staple v. Heydon*, 4

3. In treſpaſs for entering *a wharf*, if the defendant plead a right of way over the wharf to certain *ſtairs* on the river *Thames*, and the plaintiff reply,

that he had a more convenient way to the *Thames* than over *the wharf*, and iſſue is thereon joined, A VERDICT finding that he had no other way to the ſaid *ſtairs* and *Thames* than through the ſaid *wharf*, is inſufficient; for though he had no other way to *the ſtairs* and *the Thames*, he might have another way to *the Thames*, *Staple v. Heyden*, 4

4. If treſpaſs be brought againſt two for taking the plaintiff's goods, and one of the defendants juſtify the taking as by gift, A VERDICT in favour of the defendant on this plea totally deſtroys the plaintiff's right of action, and therefore, although the other defendant plead the general iſſue, and be found *guilty*, no judgment can be given againſt him, *Staple v. Heyden*, 10

5. But a verdict in favour of one of two defendants who in an action of treſpaſs juſtifies a taking in his own defence, does not deſtroy the plaintiff's right of action againſt the other defendant, and therefore if he be found guilty on the general iſſue, judgment may be given againſt him, *Marker v. Dyliffe, cited*, 10

6. In an action for diſturbance of common claimed as appurtenant to lands parcel of a manor, the omiſſion of ſtating that the lands were held at the *will of the lord*, is cured by *a verdict*; for they ſhall then be intended copyhold lands, *Crowder v. Oldfield*, 19

7. An error in declaring in treſpaſs in the time of one king, and concluding againſt the peace of another, is cured by the verdict, *Day v. Muſket*, 80

8. If ſome of the counts in a declaration be bad, and entire damages given, the error is not cured by the verdict, *Smith v. Airey*, 129

9. A verdict cures the defect of not ſtating a ſpecial agreement, *ib.*

10. A verdict will not aid when the *fit* of the action is not laid in the declaration, but it will cure ambiguity, *Awery v. Holt*, 129 *notis*

11. Nothing is to be preſumed after verdict, but what is expreſsly ſtated in the declaration, or neceſſarily implied from thoſe facts which are ſtated, *Spires v. Packer*, 129 *notis*

12. If a plaint in an inferior court be at the ſuit of *C. F.* generally, and the declaration be at the ſuit of *C. F. executor*, the variance is cured by the verdict, *Hale v. Clare*, 150

13. If the *counterpart* of an ancient deed be admitted in evidence, a ſpecial verdict finding the *original deed*, and concluding "*prout* by the counterpart it did appear," is good, *Anonymous*, 225

VERGE.

Qu. Whether the commiſſioners of the board of green cloth can commit "to "the porter of the verge," *Elderton's Caſe*, 74

VIEW.

1. In what caſes the Court will grant *a view*, 211

2. The different practice of the court of king's bench and common pleas in granting a view, *Gree v. Sharp*, 265

W.

WAGES.

1. An order of juſtices to pay ſo much money for work and labour, without ſaying that it was for wages, is bad, *Reg. v. Corbett*, 91

2. Juſtices of peace have only power to order the payment of the wages of ſtatutable ſervants, *ib.*

3. An order for the payment of ſo much for work and labour in huſbandry, is good, 91 *notis*

4. An order of juſtices made on 5. Eliz. c. 4. to pay the wages of a perſon employed by an overſeer of the king's work, in daily garden work in the garden at *Hampton Court*, is bad; for juſtices have only authority with reſpect to *wages in huſbandry*; and it appears

appears on the face of this order, that the party was a *journeyman*: but if an order be made for the payment of *wages* generally, the Court will intend it to be for *wages in husbandry*, *Reg. v. London*, 294

WARRANT.

1. If an attorney appear for a defendant without *a warrant* for that purpose, it is a contempt of Court, for which an attachment shall go against him; but if the attorney be a responsible man, he shall be answerable to the plaintiff for the damages, on a verdict being given against the defendant, 16

2. A justice of the peace, in granting a warrant of commitment, need not style himself "justice" in the warrant, 75

3. An escape warrant on the 1. Ann. c. 6. may be granted to a private person, but it must be executed by a constable, or other legal officer, *Rich v. Doughty*, 154

WARRANT OF ATTORNEY.

1. If judgment be entered on a warrant of attorney in Trinity Term, under a parol agreement that execution shall not be taken out within *a year*; *quære*, Whether the year shall be reckoned from the date of the warrant of attorney, or from the time on which the judgment was entered, *Dillon v. Brown*, 14

2. *Quære*, If in such case, execution can be taken out without a *scire facias*, *ib.*

3. If one give a warrant of attorney to confess a judgment for the saving bail harmless; though the debt be not paid, the bail cannot sue out execution until they are damnified, *Anonymous*, 78

4. A warrant of attorney given by a person under arrest to confess a judgment in the court of king's bench, is well executed in the presence of an attorney of the court of common pleas, and *vice versa*, *Inman v. Crew*, 85

5. If there be practice in obtaining a warrant of attorney from a person in custody under an arrest, it is bad, although an attorney was present, *Inman v. Crew*, 85

6. A warrant of attorney given by a person under arrest, by process from an inferior court, to confess a judgment in such inferior court, is good, though no attorney was present at the execution of it, *Inman v. Crew*, *ib.*

7. But an attorney must be present when a warrant of attorney is given by a person under arrest by process of an inferior court, to confess a judgment in a superior court, *Inman v. Crew*, *ib.*

8. If a man be under arrest, and seemingly discharged by the bailiffs, with a design that he should give a warrant of attorney to confess a judgment without an attorney's being present, and an intention to re-take him if he do not, the warrant of attorney is bad, *Inman v. Crew*, *ib.*

9. If a person arrested be really discharged, but not knowing it, or conceiving himself to be still in custody, gives, under such ignorance or apprehension, a warrant of attorney to confess a judgment, it is bad, *Inman v. Crew*, *ib.*

10. If a man give a warrant of attorney to confess a judgment the first day of the Term, and die, it may be well entered any time during that Term, *Anonymous*, 86

11. A warrant of attorney given by an administrator for a debt due by the intestate, while under custody on an arrest for a debt due in his own right, is void, *Sexton's Case*, 163

12. If judgment upon a warrant of attorney be not entered within the year, it cannot be without leave of the Court on motion, *Anonymous*, 212

WATERMAN'S COMPANY.

The *Watermen's Company* in the city of *London* is a voluntary society, and therefore a waterman's apprentice is not thereby a freeman of *London*, *Barber v. Dennis*, 69

WAY.

1. A right of way cannot be claimed from one part to another, of another man's ground; but a man may claim a way from one part of his own ground, over another man's ground, to another part of his own ground, *Staple v. Heydon*, 3

2. A man may have a right of way over the ſoil of another perſon, either by *neceſſity*, by *grant*, or by *preſcription*, *ib.*

3. The grantee of lands ſhall have all the ways, eaſements, &c. which the grantor had; and therefore, by the grant of a houſe to which there is a way by *neceſſity*, the grantee ſhall have the way, although it be not expreſſed in the grant, 4

4. To an action for a right of way claimed by *neceſſity*, the defendant may ſhew that the plaintiff has another way equally convenient as that which he claims, but ſuch a plea cannot be pleaded where the way is claimed by *grant* or *preſcription*, *Staple v. Heydon*, *ib.*

5. The grantee of wreck has, of neceſſity, a right of way to it over the land of another, *Anonymous*, 149

6. If a manor be held by tenure of repairing a highway, the alienee of any part of ſuch manor is liable to the whole charge, *Reg. v Buccleugh*, 151

7. The county, of common right, is bound to repair highways; and therefore if an indictment for not repairing a highway be brought againſt a particular perſon, it muſt be ſhewn how he was bound to repair, whether by reaſon of tenure, or by preſcription, 151 *notis*

8. The Court will not fine a defendant, convicted of not repairing a way, until it be certified, whether it is or is not repaired, *Reg. v. Cluworth*, 163

9. A *diſtringas* ſhall go for the non-repair of a way, although the offender has been fined, *Reg. v. Cluworth*, *ib.*

10. Perſons uſing navigable rivers may *by cuſtom* have a right of way on its banks, *Reg. v. Cluworth*, *ib.*

11. If a man be bound by preſcription to repair a way, he is not bound to put it into better repair than it has been time out of mind before, *Reg. v. Cluworth*, 163

12. The different kinds of ways deſcribed, *Reg. v. Saintiff*, 256

13. The ſeſſions cannot make *an order* for the repair of a highway; for they have no juriſdiction but upon *preſentment*, *Reg. v. Wills*, 307

14. The inhabitant of a county cannot of their own authority change a highway; it muſt be done by act of parliament, *Reg. v. Wills*, 307

WIFE.

See HUSBAND AND WIFE.

WILL.

See DEVISE.

WITNESS.

See EVIDENCE.

1. If a witneſs come voluntarily to give evidence without a *ſubpœna*, conſideration ſhall be had of the party's charge in maintaining him, *Anonymous*, 149

2. In caſe of a ſingle bill, two perſons, produced as witneſſes, ordered to write their names, 167

3. Subornation of witneſſes, 203

4. The party reſcued allowed as a witneſs, and why, 212

5. A former oath of the defendant's *wife* allowed for evidence of a felony committed, 216

6. The counterpart of an ancient deed loſt, admitted for evidence, 225

7. In ejectment, to prove a leaſe to the queen, an ancient book of entries was offered, 248

WRECK.

1. If a man, either by grant or preſcription, have a right to wreck thrown upon another's land, of neceſſary conſequence he has a right of way over the ſame land to take it, *Anonymous*, 149

2. The perſon who has a right to wreck, has, in conſtruction of law, the poſſeſſion of it before ſeizure, 149

3. All right to wreck was originally in the crown, *ib.*

WRIT.

1. To ſpeak contemptuouſly of proceſs, on being ſhewn a copy of a writ, is a contempt of the court out of which it iſſued, *Reg. v. Croſſe*, 44

2. A *writ of error*, directed to the Judge of an inferior court, to remove a record *coram vobis*, without naming him, is good, although the record was before his predeceſſor, *Evans v. Roberts*, 61

3. A *writ of enquiry* may be executed on the day of its return, *Brough v. Perkins*, 81

4. An addition need not be inſerted in an *alias* or *pluries*, when no addition is required in the original writ, *Lord Banbury v. Wood*, 84

5. A writ is well executed on the day of its return, although it be after the riſing of the Court, *Parkins v. Woollaſton*, 130

6. The allowance of a *writ of error* is of itſelf a *ſuperſedeas*, and the ſervice of it is only to bring the party into contempt, *Parkins v. Woollaſton*, 130 *notis*

7. A writ of error in treſpaſs on *the caſe* does not remove a record in treſpaſs *vi et armis*, *Kent's Caſe*, 138

8. A writ of error, faulty by the miſpriſion of the clerk, may be amended, *ib.*

9. A writ of error cannot be quaſhed until it is entered on the roll, *ib.*

10. What notice is required on executing a *writ of enquiry*, 146

11. If a writ be returned as executed on the 14th June *laſt paſt*, it ſhall refer to *the day* and not to *the year*, *Harvey v. Broad*, 148

12. A *writ of enquiry* returnable on a *Sunday*, is void, *ib.*

13. If a writ cannot be lawfully executed on the day of its return, it ſhall not be executed the next day, *Harvey v. Broad*, 160. 196

14. If a *writ of enquiry* be returnable *tres Trinitatis*, which is on a *Sunday*, and is returned to have been executed on the ſucceeding day *Monday*, the judgment founded thereon is erroneous, *Davy v. Salter*, 251

15. A writ cannot be executed after the day of its return, *Leveridge v. Plaiſtow*, 252 *notis*

16. A miſpriſion of the clerk in a writ of enquiry in the court of common pleas may be amended in the court of king's bench, *Michel v. Waldron*, 306

17. Filling up a writ after it is ſealed is a contempt, *Anonymous*, 310

END OF THE SIXTH VOLUME.

BOOKS

PRINTED FOR

G. G. and J. ROBINSON,

PATER-NOSTER-ROW.

1. THE HISTORY of the COMMON LAW; by SIR MATTHEW HALE. The Fifth Edition (with conſiderable Additions), illuſtrated with Notes and References, and ſome Account of the Life of the Author. By CHARLES RUNNINGTON, Serjeant at Law. In Two Volumes Octavo.

2. THE HISTORY of the REIGN of PHILIP the THIRD, KING of SPAIN. The firſt four Books by ROBERT WATSON, L.L.D. Principal of the United College in the Univerſity of St. Andrew's. The two laſt by WILLIAM THOMSON, L. L. D. The Third Edition Corrected. In Two Large Volumes Octavo. Price 12s. in Boards.

*** The Advantages of domeſtic Induſtry over the Luſt of Dominion, is the great Leſſon to be derived from the Hiſtory of Philip III. The Conferences, now firſt publiſhed, between the Spaniſh and Engliſh Commiſſioners, for effecting a Peace between their reſpective Nations, at London in 1604, throws great Light on the Intereſts and Views of the Courts of London and Madrid; on the State of Commerce, and the Sentiments, Manners, and general Character of the Age: and is indeed a Communication of great Importance to the preſent Times.

3. A CRITICAL ENQUIRY into the LIFE of ALEXANDER the GREAT, by the Ancient Hiſtorians, from the French of the BARON de St. CROIX, with Notes and Obſervations; tranſlated from the Edition publiſhed by the Author in 1607; enlarged by the lateſt Diſcoveries; illuſtrated with a new Set of Maps and other Copper-plates, by RICHARD GOUGH, F. A. and R. S. S.; and illuſtrated with a Map of the Marches of Alexander the Great. By SIR RICHARD CLAYTON, Bart. In One Volume Quarto. Price 18s. in Boards.

4. BRITISH SYNONYMY; or, An ATTEMPT at REGULATING the CHOICE of WORDS in FAMILIAR CONVERSATION: inſcribed, with Sentiments of Gratitude and Reſpect, to ſuch of her Foreign Friends as have made Engliſh Literature their peculiar Study. By HESTER LYNCH PIOZZI. In Two Volumes Octavo. Price 12s. in Boards.

5. DISCOURSES on SEVERAL SUBJECTS and OCCASIONS. By GEORGE HORNE, D. D. Late Biſhop of Norwich. Ornamented with a Fine Likeneſs of the Author, engraved by HEATH. In Four Volumes Octavo. Price 1l. in Boards.

By the ſame AUTHOR,

6. A COMMENTARY on the BOOK of PSALMS. In Two Volumes Octavo. The Fourth Edition. Price 12s. in Boards.

7. CONSIDERATIONS on the LIFE and DEATH of ST. JOHN the BAPTIST. The Second Edition. Price 2s. 6d. ſewed.

8. LETTERS on INFIDELITY. The Second Edition. Price 2s. 6d. ſewed.

9. SIXTEEN SERMONS on VARIOUS SUBJECTS and OCCASIONS, now firſt collected into One Volume Octavo. Price 5s. in Boards.

Stanford Law Library
3 6105 06 098 404 9